No. 92-1515

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH ALBERICI AND THERESA ALBERICI, H/W,
Petitioners

v.

UNITED STATES GOVERNMENT, et al.,
Respondent

JOSEPH ALBERICI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Third Circuit erred in denying Petitioner Joseph Alberici's request for a Writ of Errors Coram Nobis.

II. Whether the United States Court of Appeals for the Third Circuit erred in affirming the dismissal of our RICO, Civil Rights and State Law claims.

III. Whether the judges should have recused themselves for the obvious, gross appearances of impropriety, partiality, conflict of interest bias and/or prejudice, and the interaction of the judges violated the judicial code and Petitioners' most fundamental rights.

IV. Whether the Writ of Errors, Coram Nobis case should have been transferred to another jurisdiction when the Appellant requested it in their Brief to the U.S. Court of Appeals.

PARTIES TO THE PROCEEDING

Joseph Alberici and Theresa Alberici,

Petitioners

Safeguard Mutual Insurance Company

PA. Insurance Guaranty Association

General Accident Fire and Life Insurance

Corp., LTD.

Insurance Placement Facility of Pennsylvania

Quaker State Mutual Insurance Group

Home Mutual Insurance Company of Pennsylvania

Joseph T. LaBrum, Jr., Judge

Duane, Morris & Hechscher's Law Firm

Hugh M. Emory, Esquire

Michael O'Hayer, Esquire

Commonwealth of Pennsylvania

Burough of Darby, Pennsylvania

Thomas J. Powers

Kenneth J. Boyden, Esquire

United States Government, Respondents

STATEMENT OF THE CASE

Argument:

Whether the United States Court of Appeals for the Third Circuit erred in denying Petitioner Joseph Alberici's request for a Writ of Errors Coram Nobis.

Whether the United States Court of Appeals for the Third Circuit erred in affirming the dismissal of our RICO, Civil Rights and State Law claims.

Whether the judges should have recused themselves for the obvious gross appearances of impropriety, partiality, conflict of interest, bias and/or prejudice and the interaction of the judges violated the judicial code and Petitioners' most fundamental rights.

Whether the Writ of Errors, Coram Nobis case should have been transferred to another jurisdiction when the Appellant requested it in their Brief to the U.S. Court of Appeals.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be signed."

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides as follows:

Section 1 of the Fourteenth Amendment is the source of many civil rights, and prohibits states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; from depriving any person of life, liberty, or property, without due process of law; and from denying to any person within their jurisdiction the equal protection of the laws. There are thus three distinct provisions guaranteeing the rights of persons and property: (1) the privileges and immunities clause; (2) the due process clause; and (3) the equal protection clause. The Amendment makes no attempt to enumerate the rights it was designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities. The commands of the Amendment are addressed, however, only to the state or to those acting

under color of its authority. The Amendment itself erects no shield against merely private conduct, however, discriminatory or wrongful. Similarly, actions of the Federal Government and its officers are beyond the purview of the Amendment.

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. The clause protects all citizens against abridgment by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship. The Constitution nowhere defines the meaning of the words "citizen of the United States."

Also, the rights of national citizenship have never been completely listed by the Supreme Court.

The due process clause was intended, in addition to other guaranties or private rights, to give increased security against arbitrary deprivation of life or liberty, or the arbitrary spoilation of property. It adds nothing to the rights of one citizen as against another; it simply furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society. The term "due process of law" refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. The guaranty of due process demands only that the law shall not be

unreasonable or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained. The due process clause does not prohibit action by a private individual, unless the state, in any of its manifestations, has in some way involved itself in the actions of an individual to some significant extent.

The equal protection clause of the Fourteenth Amendment furnishes a distinct right, separate from and independent of the rights protected by the privileges and immunities clause. Rights under the equal protection clause arise only where there has been involvement of the state or one acting under its authority. It does not add anything to the rights which one citizen has under the Constitution against another. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its

constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. Not every denial of a right conferred by state law involves a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment, even though the denial of the right to one person may operate to confer it on another. The element of intentional or purposeful discrimination is necessary to establish a denial of equal protection of the laws. This may appear on the face of the action taken with respect to a particular class or person, or it may be shown by extrinsic evidence establishing a discriminatory design to favor one individual or class over another. A discriminatory purpose is not presumed, and must be clearly shown.

STATUTORY PROVISIONS INVOLVED

The United States Code, Act of June 25, 1948, C.645, 62 Stat. 763; May 24, 1949, C.139 §34, 63 Stat. 94, 18 U.S.C. §1341, provides as follows:

"§1341. Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the

Post Office Department, or takes or receives therefrom, any such matter of thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W

v.

UNITED STATES GOVERNMENT, et al.

JOSEPH ALBERICI

v.

UNITED STATES OF AMERICA

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRIUIT

Pro Se Petitioners Joseph Alberici and Theresa Alberici hereby petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in connection with (i) the denial of Petitioner Joseph Alberici's Petition for Writ of Error Coram Nobis, (ii) the denial of an appeal from the dismissal of a rehearing petition on behalf of Joseph and Theresa Alberici, alleging violations of the Federal RICO and Civil Rights laws, and pendant state law claims, and that part of the order of the Third Circuit Court of Appeals finding that our claims were frivolous. The summary judgment against Petitioner Theresa Alberici has previously been overturned on two separate occasions. Petitioner Theresa Alberici is joining in the Petition only with respect to the RICO, Civil Rights and state law claims of the rehearing petition, and that part of the order of the Third Circuit Court of Appeals finding that our prior

appeal in the RICO, Civil Rights and state law claims suit was frivolous, and is not a party to the Petition with respect to the Writ of Error Coram Nobis.

OPINIONS BELOW

A copy of the Order of the United States District Court of Pennsylvania, dated March 13, 1992, and the Amended Order of Court issued March 20, 1992, is contained in Appendix A. Copies of the Order of the Court of Appeals for the Third Circuit dated October 6 and November 5, 1992 dismissing the appeal from the orders contained in Appendix A is contained in Appendix B. A copy of the final Order entered April 7, 1992, by the United States District Court denying Petitioner Joseph Alberici a Writ of Error Coram Nobis is contained in Appendix C. A copy of the Judgment Order dated November 24, 1992 wherein the Court of Appeals for the Third Circuit affirmed the judgment of the

District Court contained in Appendix C is contained in Appendix D.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF CASE

This is a consolidated Petition for Certiorari arising from a long term travesty of justice involving two separate legal matters which arise from circumstances surrounding the agreement to purchase a commercial building and the fight between Petitioners, as policyholders, and their insurance companies for insurance proceeds which became payable upon damage to the building. As noted by distinguished lawyer and author William M. Shernoff, "(m)any policyholders settle a claim for less than is due them as a way of life. Rather than being rescued by the heroic images used by insurance companies such as Paul Revere, John

Hancock, or Thomas Jefferson, the policyholder becomes victimized by accusations. He or she is charged with dishonesty, arson, malingering, and fraud." Payment Refused, Richardson & Steirman, Inc., 246 Fifth Avenue, New York, New York, 10001, Copyright 1986, ISBN 0-931933-14-5. To me, and to my wife and family, Mr. Shernoff's words really hit home because this has been our life story since 1978. It was in 1978 that we filed suit against our insurance companies for the proceeds of insurance policies which became payable as a result of a fire which damaged a building we owned. The fire occurred before we purchased the building, but our lawyer told us the agreement we signed placed the risk of loss on us. Our insurance brokers advised us on insurance, and because of some pricing schedules, we were told it was cheaper for us to purchase more insurance than we needed because we could get it for less. Our

coverage was about $450,000 of insurance on the land and building plus $50,000 for the contents. A binder for $100,000 of insurance was due to expire in a couple of days, leaving only $350,000 of insurance. The building was a movie theatre plus parking, and we intended to use it for a catering business or restaurant. At the time, our son wanted to be a chef. He has since become one, a fine one. We purchased the building from a distressed owner for what we believed was much less than the fair market value. Prior to closing, the fire occurred. We were forced to close the transaction. Afterwards we were approached about the insurance proceeds by an adjuster, and we decided to pursue the insurance. As naive fire insurance policyholders, we did not make a fire loss claim because we expected to hear from the insurance companies, because we were told they would contact us. The adjuster approached us at the site October 31, 1977;

13 weeks had passed since the 30-day deadline contained in the insurance policies. If I had a scheme to defraud anyone, I would have claimed a loss immediately. Eventually I, Joseph Alberici, was indicted for mail fraud. The indictment alleged I had the building burned so that I could collect insurance proceeds. The federal prosecutors produced witnesses that said they burned the building for me. These witnesses said they used several 55-gallon drums of naphtha and left one at the theatre. Although the Pennsylvania State Police and local crime labs had some type of records about finding a 55-gallon drum, they said the drum contained phenol. Phenol, from what I understand, is an agent for cleaning that would not be uncommon to find in a movie theatre. I don't know what it was. We had not purchased the theatre yet. No one ever found any explosive material; no one ever found a destructive device. The state investigators confirmed

this in writing, but the federal prosecutors had some witnesses who testified that they burned the theatre. The one witness, Joseph DiTizio, who the trial judge found to be the only one who provided credible evidence had his family relocated. He received $5,000.00 plus expenses for his lying testimony. The federal government's alleged arsonists, Vincent Fardella and Joseph DiTizio, were indicted on three counts November 10, 1981. Count Two was for interstate transportation in aid of racketeering arson. The indictment states: "defendants did travel and cause travel in interstate commerce, from the State of New Jersey to the State of Pennsylvania, with the intent to establish, promote, manage, carry-on and to facilitate the promotion, management, establishment and carrying-on of an unlawful activity, the unlawful activity being arson, in violation of the laws of the State of Pennsylvania, in violation of Title 18, United States Code,

Sections 1952 and 2.

This occurred nine months before the Statute of Limitations on arson expired on August 6, 1982. It's incredible that the Commonwealth of Pennsylvania and Delaware County stopped investigating the arson on September 28, 1978, according to State Trooper DiGiamberdini's report.

(1) The State and County officials knew from the appearance of the building after the fire that no structural damage was done.

(2) They knew no damage was done to the adjoining homes and automobiles. The windows therein were not cracked or shattered.

The alleged arsonists, one in the building and the other outside the front door waiting to pick him up in the get-away car when the explosion alleedly occurred, did not get hurt. They would have been exterminated if the explosion had occurred with the use of

75-gallons minimum or 110-gallons maximum of naphtha (a volatile explosive) according to Agent Lory's hearsay report. It's no wonder Lory's report given to the A.T.F. lab in 1979 and the analysis of it are missing since 1986.

A serious question, it was public knowledge by the many news articles that appeared, because I was an unindicted co-conspirator -- what happened to the State and County officials responsible for a state crime? They were fully silent, besides not interviewing or questioning them or me about a serious crime. This is a violation of my due process and an obstruction of justice. Later my conviction was overturned. Later still, my conviction on Count Five, was reinstated. After my conviction was reinstated on Count Five, the gross inconsistencies of the alleged arsonists and other government witnesses lead me to wonder if the alleged arsonists really did burn the

building, and if they did, did they do it the way they said they did. I mean, if they had, I certainly hadn't hired them. I consulted a chemist at the University of Pennsylvania in Philadelphia. This consultant advised me that if 110-gallons of naphtha were lit in the manner described by the witnesses, they would have been incinerated and a gaping hole left in the ground. But although we had $450,000 of insurance (the government prosecutors referred to it as a "cool half million"), our claim wasn't even for half of that. Not only was there no gaping hole in the ground, there were witnesses left to tell about it. No structural damage was found. I told this to both the District Court and the Appeals Court, but they said they couldn't help since my lawyer could have called this chemist at the trial but he didn't. This same United States Court of Appeals said my lawyer, who didn't use this chemist at trial, was not negligent. Something just didn't

seem right. If my lawyer investigated these witnesses, he must have found out about the lies the witnesses told. I think any other tactic which ignores this is negligence. I know I am innocent. Since then, I have been investigating and pursuing the same goal in three different lawsuits.

This Petition for Certiorari is my last chance at restoring my good name and that of my family. That was ruined when the Honorable Judge Pollak noted that although it seems that I had led an exemplary life, I had been convicted. He noted that he didn't know if he would have reached the same conclusion as did the jury. Ironically, this, my last grasp, comes at a time when all three of our lawsuits (with the exception of Petitioner Theresa Alberici's claim for insurance as an innocent co-insured) have been turned down by the Pennsylvania Supreme Court and the United States Court of Appeals, and all within months of each other. The resolution has

been that I stand convicted of Count Five. It sent me to prison; it has kept insurance monies from me and my wife; it has ruined our lives. All of this travesty does not violate our rights, we were told, because I stand convicted of Count Five. Count Five, as a technical matter, has problems, too. The Grand Jury indicted me for Count Five on evidence labelled Exhibit 49A, supposedly a letter sent from my insurance adjuster to an adjuster who no longer worked for any of the insurance company defendants in my civil case since October 19, 1977; three months before he allegedly received the letter on January 24, 1978. I say this because this letter was supposedly sent from one person to another, each knowing full well of the other's employer, the spelling of the other's name and other important information. However, this Exhibit 49A was sent to a Mr. Derrung. The actual person was Mr. Perrone. The company name was spelled wrong (Curly vs.

Curley) and contained the wrong word (Bureau vs. Company). This Exhibit 49A had no letterhead, no signature, nor a "received" stamp on it. It was addressed to a person who did not exist, at a company that did not exist, and no one ever testified that this letter was ever mailed. At trial, the prosecutor produced a letter and introduced it as Exhibit 12. Exhibit 12 is entirely different from the Grand Jury Exhibit 49A. It has a letterhead. It has pen marks, little dots, to make it look like it had a signature. No one ever testified that they signed this letter or sent it in the mail. In fact, it looked like a letter that someone had cut and pasted a letterhead on and made a copy. Exhibit 12 had a received stamp on it. Another letter for another count had a received stamp on it. I do not stand convicted on this Count (Six). The same evidence, but not the same result. One is wrong. I think the result on Count Five is.

For years I have struggled through my investigation and have fought on every conceivable ground with a series of lawyers. We have alleged technical violations, factual and legal defenses, constitutional defenses and the like. I even have come to believe that, based upon all the inconsistencies of various legal decisions, perhaps there is a conspiracy to hide what no one wants to be made public. I have alleged such in the RICO case I am appealing. I think each lawyer failed to see the whole picture. I did not hire the prosecutor's witnesses to burn the movie theatre, yet by some twist of the system I stand convicted of this crime. This set of circumstances has led to this Petition.

ARGUMENT

I. The United States Court of Appeals for the Third Circuit erred in denying Petitioner Joseph Alberici's request

for a Writ of Error Coram Nobis.

A. The evidence was insufficient to prove use of the U.S. Mails, or to prove Petitioner knowingly used them. Petitioner has alleged and testimony below proves the following:

1. The ATF agent, Barry Lory, and Pennsylvania State Trooper, William DiGiamberdini, investigated and found no evidence of a destructive device.

2. ATF agent Lory and Pennsylvania State Trooper DiGiamberdini illegally searched and seized property from our building. They used this property later to falsify evidence for a trumped-up arson explosion in violation of our civil rights under the Fourth Amendment.

3. The Delaware County, Pennsylvania crime lab determined that a 55-gallon drum found at the scene contained a cleaning agent, and this report was given to agent Lory and DiGiamberdini.

4. No one from Ulmer & Company ever testified at trial that they sold naphtha or the alleged place of purchase of naphtha (that was never found at the scene).

5. Mr. Teplick, from Ulmer, could not identify the alleged arsonists, although it was alleged that Teplick sold the naphtha to them, and he was shown identification pictures of the alleged arsonists on several occasions. Mr. Teplick was excluded for allegedly violating sequestration.

6. The receipt from Ulmer was tampered with. Agent Lory indicated it was Receipt No. 1480; Mr. Teplick indicated it was Receipt No. 14840; and the receipt itself contained only 148.

7. There was no evidence of use of the U.S. Mails.

8. Exhibit 12 was not sent by certified mail.

9. There is nothing in the court record to indicate it was ever mailed.

10. Mr. Horowitz did not send the letter out, and he did not sign it. Mr. Horowitz testified at a deposition on February 12, 1988, that he did not authorize the letter to be sent, nor did he sign it. Mr. Horowitz's testimony was that the letter in question sends our claim. In regard to the effect of this "sends," see Hart, infra.

11. The conviction was purported to be reinstated based upon a charge of delivery. The statute requires knowing delivery, specific intent. No one in my family ever asked the letter be sent or knew it was ever sent.

12. There was a practice in the office of Bertram Horowitz to have documents personally delivered. This is particularly important where, as here, the recipient is so close to the sender.

13. Mr. Horowitz was not personally familiar with the custom and practice of mailing procedures at this office, Young

Adjustment Company. Besides, his testimony of the normal course of business of his company in August of 1977 was to mail these documents. The letter in question was sent out on January 23, 1978. No one testified concerning the normal course of business on that date. In all of these goings-on, our rights were trampled. The fact that no one testified that they signed or mailed the claim, and no one testified that they personally were familiar with and knew the office procedure, and that procedure was that all documents are mailed; that, in fact, the procedure was to have some things hand-carried (particularly in the same area of the City). All of these facts indicate that there is insufficient evidence of use of the mails. F.R.E. 602 and 801(c), the knowledge requirement of 803(6), and United States v. Hart, 693 F.2d 286 (1982), White Industries, Inc. v. Cessna Aircraft Co., 611 F. Supp. 1049 (1985).

B. Petitioner's right to due process was violated by withholding of information by the District Court and the Prosecutor that Petitioner's counsel was involved in a grant of immunity.

Petitioner has alleged and proven the following in the Courts below:

1. Petitioner's counsel was offered and accepted informal immunity in a matter relating to attorney's fees for one Willard E. Moran.

2. The Prosecutor and the District Court entertained Petitioner with a court appearance to determine if Petitioner knew this and was agreeable to his counsel's continued representation.

3. Petitioner's counsel objcted to the hearing.

4. The judge misled Petitioner at the hearing, telling petitioner that (i) the manner involved a dispute over fees, (ii) the judge did not know who the other client was,

and (iii) there were no adverse reflections on Petitioner's counsel. This was all lies.

5. Mr. Moran was a convicted murderer.

6. Mr. Tinari, Petitioner's counsel, took a transfer of cash from an organized crime figure across state lines. The person who paid Mr. Tinari was later found guilty along with another organized crime figure of hiring Mr. Moran for the murder of John McCullough, head of the roofers union in Philadelphia.

7. Judge Pollak knew the other client.

8. Judge Pollak knew that the Grand Jury matter for which Mr. Tinari was offered and accepted immunity involved a related matter, but the judge told Petitioner that he had no ground for thinking that Mr. Tinari was anything but faithful.

9. Judge Pollak knew that the other Grand Jury matter involved a Ralph Natale,

one who was alleged to be involved in my criminal case.

10. The Prosecutors knew of all of this but failed to so state when asked.

11. Natale was involved with the alleged arsonists. With Mr. Tinari involved with so many crime figures who were intertwined with this case, and with the FBI and the trial judge and Prosecutor aware of it, how could Petitioner ever get a fair trial with Tinari as counsel?

12. The Court of Appeals agreed with me that all of this posed a conflict of interest, but then they said I abused the remedy. I think they mean I should have known sooner.

C. The Government had a conflict of interest in prosecuting me.

1. David R. Strawbridge, Esquire, was the Assistant U.S. Attorney who issued the Grand Jury subpoena to me. I appeared and made a statement, at the law offices of

Cozen, Begier and O'Connor, because they were representing the insurance companies. Shortly thereafter, Strawbridge joined the Cozen firm. Then Karl Lunkenheimer, who was active in the insurance company defense, went to work as an Assistant U.S. Attorney. Also, in 1988 Michael Baylson, associated with the firm of Duane, Morris & Heckscher, the insurance companies' attorneys since 1984, was recommended by U.S.Senator Arlen Specter for appointment as a U.S. Attorney in the Eastern District of Pennsylvania. This recommendation was approved by John McNichol, Delaware County and The Eastern District's most influential Republican boss. Mr. Baylson is no longer in that position. Besides, Mr. Baylson was Senator Specter's re-election Campaign Tresurer in 1986, raising money and using the law firm's time. It looks like the government was prosecuting me for the insurance companies and exchanging lawyers between them to aid in the process.

The Cozen firm was forced to withdraw from the matter for their grossly despicable actions and conflicts of interest. I think the government should be conflicted out too.

D. The indictment was improperlyframed, grossly in error, legally insufficient, and fraudulent.

1. Quaker State Mutual Group and Eastern Mutual Insurance Company insured the theatre but no claims were made against them. They were included in the indictment to inflame. It permitted the Prosecutor to be able to refer to a "cool half million." The judge should have charged the jury not to include reference to them in their deliberation, and no reference to these two insurance companies should have been permitted. If the reason they were permitted was because my lawyer didn't object, then my lawyer was negligent for not objecting. Taking all of this into consideration, and referring to the indictment, paragraph 4(P),

our claims against Insurance Placement Facility, General Accident Insurance Company and Safeguard Mutual Insurance Company amount to only $159,730.70. This figure is not even close to a "cool half million," and the reference thereto was made only to inflame the trial jury.

2. Mr. DiTizio's trial testimony contained repeated denials that he ever talked to Petitioner Joseph Alberici over the telephone. This contradicted the serious and false charge as set forth in the scheme of the indictment. He was the person the trial judge found to be indispensable to my conviction. This was just after noting that he (the Judge) could not say he would have found as the jury did.

3. The government intimidated then plea bargained the witnesses' testimony in exchange for deals on charges not related to the Petitioner. These witnesses would have said anything to make a deal.

4. I was never charged with arson. (The Pennsylvania Superior Court also found that I could have been convicted without there ever having been a determination that I committed arson. This was in connection with my appeal concerning the state case for insurance proceeds, discussed infra).

5. Count One and Count Three both relate to Safeguard. If Count One and Count Three were set aside, how can Count Five, which relies on Count One, and the Count One Insurance Company still stand? Especially since Count Five, which includes Curly Adjustment Co., Perrone and Derrung, on this intangible and irrelevant letter copy, is not even mentioned in the indictment scheme of Count One. Nor are they mentioned in the Count One, Paragraph 4(p).

6. Judge Pollak fatally and grossly erred in reconsidering the Prosecutor's Motion to Vacate Order of New Trial. Judge Pollak, after the alleged "reconsideration"

found me guilty of Count Five only, based upon Exhibit 12 and not Exhibit 49A, the most insignificant, intangible, and irrelevant mail fraud count of the six-count indictment. Judge Pollak had a moral and ethical duty to exercise his judicial prudence and scholarly experience. He was bound to thoroughly review and analyze the indictment, its scheme, Grand Jury Exhibit 49A and Trial Exhibit 12. Judge Pollak neglected to do this because if he did do this he would have noticed that I was not charged two additional counts for Eastern Mutual and Quaker State insurance companies. He also erred when he allowed the Prosecutor, in her opening statement, and another Prosecutor, in his closing statement, to refer to these two insurance companies. All of this had the effect of placing evidence of trial on eight counts, when the scheme of the indictment mentions only three insurance companies for four counts. In failing to instruct the jury

in this regard, Judge Pollak erred. The facts here leave very little doubt as to why all of the mail fraud evidence is missing from Judge Pollak's chambers, the U.S. Attorney's office and the ATF Washington Bureau.

The indictment was drawn in a way to deceive and inflame the jury. Petitioner also believes that an inept scrivener prepared it. Counts Five and Six, by any reasonable look at the indictment, should have referred to Quaker State and Eastern Mutual. But we didn't make claims against those companies. In addition, I think the letter which was submitted in Count Five was fabricated. The indictment was not proved by the trial evidence, and the evidence which was used was deceitfully substituted at trial to make it look worse for us.

E. Counsel was negligent for not objecting to the substitute.

1. Counsel did not object to the

substitution of Exhibit 12 for Exhibit 49A.

2. Petitioner did not sign the stipulation for use of Exhibit 12 in substitution for Exhibit 49A. Why would I ever do that anyway?

3. The substitution of Exhibit 12 for Exhibit 49A, now with a received stamp and a letterhead, at such a late stage in the proceedings, deprived me of meaningful confrontation and cross-examination of witnesses. This having been the case, Stirone v. U.S., 361 U.S. 212 (1960) requires a finding of reversible error. See also, U.S. v. Maselli, 534 F.2d 1197 (1976), U.S. v. Goldstein, 502 F.2d 526 (1974), Gaither v. U.S., 413 F.2d 1061 (1969), Ex Parte Bain, 121 U.S. 1 (1887). The decision in my case creates a dichotomy between decisions of different circuit courts of appeals.

This also trampled our rights under the Fifth Amendment and Sixth Amendment, in that the government did not amend the indictment

but introduced evidence which provied materially different facts. See, U.S. v.Cusmano,659 F.2d 714 (1981).

F. The Trial Judge entered the jury room and tainted the jury in violation of the sanctity of jury deliberations.

1. Judge Pollak entered the jury room at 0955 on January 19, 1983.

2. No transcript preserves what was said.

3. Counsel was not present.

4. The proper procedure is to bring the jury into the courtroom for instructions.

5. The jury reached a verdict of guilty shortly after the judge entered the jury room.

6. At Bertram Horowitz's deposition on February 12, 1988, and later, for the 1978 civil case, Plaintiffs discovered that the principal issue in all the litigation, which is Count Five, is false, fraudulent and fabricated.

For all of the foregoing reasons, my conviction on Count Five must be reversed.

7. Judge Rita Prescott held ex parte communications where our counsel was excluded, both in person and by telephone, with the U.S. prosecutors and at a hearing for discovery. After this ex parte conversation, Judge Prescott continued this matter. No evidence was presented to justify the continuances. The prosecutors failed to respond to several rules to show cause why the matter should not proceed.

II. The Government's Prosecution Was Tainted By Its Failure To Disclose Exculpatory Evidence, By Its Coercion of Government Witnesses and By Its Casual Amendment of the Evidence.

A. The prosecution of Defendant was tainted by the government's failure to disclose certain exculpatory evidence, by its blatant arm-twisting of government witnesses,

and by the process of changing evidence during the investigatory stages of the case to fit its needs as follows:

1. The reports used by certain federal and other crime agencies werenot made available to Defendant.

2. The reports issued and used as evidence, such as the reports of the Bl-County Crime Lab and the Bureau of Alcohol, Tobacco and Firearms Laboratory, are lacking in substantive value in that the reports fail to distinguish between gasoline and naphtha or the amounts of gasoline and naphtha found. Further, the reports fail to show normal percentages of naphtha found in rugs or the atmosphere. Moreover, the ATF Lab relied on ATF Agent Barry Lory's March 27, 1979, report requesting that a Title XI Determination Report (Explosive) be made based on his false hearsay report that the quantity of naphtha, maximum 110 gallons, minimum 75 gallons, was used for the Jerry Lewis Theater fire (FOIA,

p. 26). Also, at this point in time the government did not know anything about Ulmer & Co. and Teplick. Lory allegedly interviewed Teplick on June 4, 1979.

3. When Fardella appeared recalcitrant to testify the way the government wished, it filed a Dangerous Special Offender Petition against him and the U.S. Attorney misled Petitioner's attorney on the status of this matter on December 28, 1982.

4. Charles Allen's statements of September18, 1978, and October 7, 1978, stated he and Fardella did the alleged arson and did not even mention DiTizio.

5. Allen, the government, and Fardella stated many times that only Allen and Fardella were involved in setting fire to the Jerry Lewis Theater on August 6, 1977, FOIA pp. 20, 22, 25, 28,29 and 57. Also, Allen Memorandum of Agreement dated December 31, 1978 and Allen's information pleading

filed with the Court on February 4, 1980, and Fardella's polygraph examination on September 24, 1981.

6. On December 18, 1981, DiTizio filed a motion for trial severance from Fardella, because Fardella had exculpated him at the August 14, 1981, meeting and at the September 24, 1981 polygraph.

7. On December 23, 1981, the government answered DiTizio's severance motion and admitted that Fardella had exculpated DiTizio.

8. On January 4, 1982, AUSA Wehner sent Burton Rose, DiTizio's court-appointed attorney, a letter saying Fardella stated "that he and Charles Allen committed the arson at the Jerry Lewis Theater at the direction of Allen and that no third person was involved."

B. Judge Pollak granted DiTizio the trial severance on January 18, 1982, and in his memorandum he gave four specific reasons

why he granted the severance.

1. Wehner's August 10, 1981, agreement letter to Mr. Simon, Fardella's attorney.

2. Fardella's September 24, 1981, polygraph exculpating DiTizio.

3. Wehner's January 4, 1982, letter to Mr. Rose exculpating DiTizio.

4. Fardella would not exculpate DiTizio and inculpate himself.

C. Fardella in his testimony of January 10, 1983 stated that: "One other person was present when the arson was performed on August 6, 1977, Charles Allen. No other person was present." pp. 60-61. This conforms with Fardella's statement to the government on August 14, 1981, FOIA, p. 56, and AUSA Wehner's statement in his letter to Burton Rose, DiTizio's attorney on January 4, 1982. Fardella: "I saw DiTizio one time when I came from the federal institution to be arraigned, and he was sitting in the back

of the courtroom, and I was told through my attorney that this is Mr. DiTizio." And but for someone telling you, you would not even recognize him today; isn't that correct? Fardella: "Correct." pp. 90-91. Fardella: They wanted me to testify on the Jerry Lewis Theater, and at that time they had five names - I think it was either four or five names they had down, which one was mine, and Charles Allen, and Ralph Natale. "Well, the other names I didn't even know, never met them people in my life." p. 112. Mr. Wehner: "When that statement was taken by myself and Ms. Epps you did not tell the truth at that time; isn't that correct? Fardella: "No." p. 115.

D. In an early statement to Agent Lory, William Merrill, III and Gladys Merrill, his mother, and William Merrill, his father, stated that the persons at the theatre were in their twenties, and when shown a photo spread containing Fardella, DiTizio and Allen

they were unable to identify them. They were not called at trial to identify either Allen, Fardella or DiTizio, even though Fardella, DiTizio and Allen were present or in custody. This fact was never communicated to defense counsel and their statements were not turned over to the defense until February of 1985.

1. Mr. Merrill did not see any drums being put into the threatre or removed from the theatre.

2. The salesperson at Venuti's Hardware saw pictures of the alleged arsonists and could not identify them as parties who bought tools in his store, which tools were found at the fire scene.

3. Mr. Teplick also failed to identify the alleged arsonists.

4. The Honorable Louis Pollak, Trial Judge, was involved in the processes of pleas changes and other stages of the prosecution against DiTizio, Fardella and Allen, which processes produced evidence which was so

divergent at times to be unbelievable and certainly not credible and he should have seen such inconsistencies.

5. The evidence of explosive agents such an naphtha and the alleged use of such was trumped up, manufactured and otherwise devised so as to give the court jurisdiction when in fact there were no explosives and no evidence of such.

6. The prosecution failed to disclose Jenks and Brady materials, thereby violating Petitioner's due process rights and depriving him of a fair trial.

III. The Court of Appeals Erred in Affirming the Dismissal with Prejudice Our Complaint in RICO, Civil Rights and State Law Claims.

A. Petitioners should have been permitted to amend the Complaint.

1. Dismissal of a complaint for failure to state a claim should be dismissal without prejudice, and plaintiffs should be

permitted to amend unless there is a determination that the allegation of other facts consistent with the challenged pleading could not possibly cure the deviancy. Sidebotham v. Robison, 216 F.2d 816 (1954).

2. Petitioners filed the Complaint pro se.

3. Sidebotham, supra, indicates that it is of no importance that no request to amend was made in the District Court.

4. The various participants engaged in extortion and other racketeering activity. This activity denied us our civil rights and our rights to due process.

A fair reading of the complaint indicates the above and shows what we now believe to be true. The complaint, as originally drafted without the aid of an attorney, did state claims for RICO, civil rights violations, defamation and infliction of emotional distress. If all of the formalities of pleading were not observed,

that's because we are not lawyers. It is important to mention that once I was convicted, we found it impossible to find a lawyer who would help us.

B. The statutes of limitation had not expired.

1. RICO claims accrue when the plaintiff knew or should have known of the elements of a RICO action, and the claim must be brought within four years of that date. Agency Holding Corporation v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).

2. The District Court concluded that Petitioner's claim accrued not later than January 8, 1985 (the date I filed the motion for new trial based upon new evidence, the chemist's report that the government's witnesses could not have burned any building the way they said they did).

3. We believe that the cause did not accrue until the Petition for Coram Nobis is, if it is, denied certiorari. Until then the

conviction is not final.

4. The civil rights claims have two year statutesof limitation, but actions as late as August, 1992 occurred to violate our civil rights and the claim was filed in 1991.

5. Darby Borough of Delaware County Pennsylvania, under the complete political power and control of Mr. McNichol and his political associates, between June 18, 1990 and December 5, 1990, issued 27 citations and warrants for the fraudulent and intimidating false arrest of Joseph Alberici. This was done with the intentional misrepresentation to force appellants to drop or settle our civil action for a ridiculous sum of money. Besides, a false hearing was held on February 11, 1991. My brother's attorney had many factual and notarized documents attesting to the fact that I had nothing whatsoever to do with the charges on the citations and warrants. I also testified I had nothing to do with my brother's business since 1972, and

no one informed me of the defamatory and false citations and warrants circulating around the county by Pennsylvania State Constables. The citations and warrants were all issued by the Commonwealth of Pennsylvania. Regardless of this, the District Judge, after considering the case and evidence for two weeks, intentionally, for his political superiors, found me guilty on February 27, 1991.

6. Later, I received a letter through the mail dated February 27, 1991 attempting to extort $5,390.50 from me. This is a factual mail fraud.

7. Delco Halls and Caterers through George Alberici, my brother, settled these false charges in the Court of Common Pleas on March 13, 1992, for $200.00 plus costs. An agreement was reached to delete my name, and my brother pled guilty.

C. The District Court erred in finding no basis for tolling the statute.

1. If, as a part of the same pattern of racketeering activity one suffers further RICO injury, or if further predicate acts occur, then the cause does not accrue until one should have known of the last act or last injury. Keystone Insurance Company v. Houghton, 863 F.2d 1125 (1988).

2. The Third Circuit Court concluded that the fact that the Court of Common Pleas in Delaware County, Pennsylvania granted summary judgment against us in our case against the insurance companies for the insurance proceeds was not further injury. The acts of alleged conspirators in seeking that grant of summary judgment by knowing use of a conviction alleged to be obtained by fraudulent means was not further predicate acts. We disagree and believe that as a matter of law they do constitute further injury and further predicate acts. These acts (knowing use of evidence of a conviction alleged to be obtained by fraudulent means)

are still continuing today, and they are further predicate acts. Furthermore, this decision was based on intentional criminal activity of misrepresentation and fraudulent lies contained in the insurance companies' memorandum of law which was filed five and one-half months late, while this case was on appeal in violation P.R.A.P. 311(e), 1921 and McAllonis v. Pryor, 448 A.2d 5, 6 Pa. Super. Court (1982).

D. These further predicated acts also serve the purpose of denying us our civil rights. My liberty has already been taken for fourteen and one-half months. Our money has been withheld and our reputations muddied for fourteen and one-half years. Each use of the conviction further deprives us of our rights, further damages our reputations, and causes us severe emotional distress and irreparable harm in violation of our rights to due process under the Fifth and Fourteenth Amendments.

1. Petitioners also suggest that, as stated by Justice Reed in United States v. Morgan, 346 U.S. 502, at 512-513, "(w)here a petitioner has fully served his prison term for a felony conviction, though the term has been served, the results of the conviction may persist. Subsequent conviction may have heavier penalties (or) civil rights may be affected." Appellant's civil rights are continuing to be affected. Even the defendants below admitted this when they argued that the outcome of this (RICO) case was predetermined by Joseph Alberici's conviction for mail fraud. Petitioners acknowledge this fact, and still allege that the conviction was obtained by false and fraudulent means, (the fabrication and knowing use of fabricated evidence). Appellants believe this resulted in our civil rights being trampled by the powerful, legal, judicial and political force, carried out by intimidation.

E. The following represents government actions since the date of the filing of our appeal to the Court of Appeals, which we believe further deprives us our civil rights and our rights to liberty and property as guaranteed by the United States Constitution.

1. Our Petition for Rehearing to the Appeals Court was denied on October 6, 1992. The denial was addressed to appellant Joseph Alberici and costs were attached to him.

2. On October 20, 1992, we filed a Supplemental Petition for a Rehearing. Our prior attorney on the same day received a telephone call from Ms. Jacobsen from the Office of the Clerk. This telephone call was apparently made for the purpose of informing counsel of our pro se filing, and to inform us that we made several mistakes in our filing. One was that my wife's name had to be removed. We believe the call was mde for the purpose of misinforming us in an effort

to deprive us of our rights.

3. In addition, I had a personal discussion with another employee at the Office of the Clerk, Mr. Baldus. Mr. Baldus glared at me and his complexion was as white as a ghost. Mr. Baldus said I have to remove my wife from the Petition for Rehearing because her name was not on the application for appeal. Mr. Baldus was very arrogant, and he was trying to intimidate me into dropping my wife as a party to the Petition for Rehearing. As I summarized above, all plaintiffs filed the appeal. No party appellee objected to the filing of the original appeal on behalf of all plaintiffs. Shortly after, I received a letter from Mr. Baldus admitting he made a mistake.

4. Ms. Jacobsen and Mr. Baldus conspired to intentionally misrepresent and lie to us and the court to intimidate us by the following actions.

5. Between October 20 and December

8, 1992, we received many strange and intimidating orders and letters from different persons with different costs against all appellees and their attorney because they claimed we filed a frivolous suit. This is ridiculous because they completely ignored several important issues we listed in our supplemental rehearing petitions. Besides, my wife won her 1978 civil action complaint four times in the Appellate Courts, twice in 1986 and 1987, and twice in 1991 and 1992.

6. Ms. Jacobsen sent notices to Appellees Barry J. Goldstein, Ulmer & Co., Inc. and Theodore Teplick to file affidavits by October 30, 1992, and then went further to recommend that other parties file for damages and costs by the same date. We believe this is improper for the court to recommend to appellees that they file for damages while we have a Motion for Rehearing of October 20, as supplemented by our filings of October 28 and

November 9, 1992 pending before this same court. Especially since the dismissal of our appeal was accomplished by Judgment Order dated October 6, 1992 which we received under the same cover letter which sent us the order denying damages and costs to Horowitz, Haas and Young.

7. Joseph Alberici is the only person who verified the facts alleged in the RICO Complaint. There were six other plaintiff parties, each of whom verified only that part of the complaint which recited names and addresses, and relationships to the businesses owned and operated by my family. They did not verify any other information. This was all clearly set forth in the Complaint.

8. F.R.A.P. 39 requires a bill of costs and an affidavit be filed within fourteen days after judgment. Ulmer & Co. filed for costs on October 15, 1992. Horowitz, Haas and Young Adjustment filed on

October 16, 1992. Tinari filed on October 9, 1992. Barry Goldstein filed October 19, 1992. Not one of these Movants filed the required affidavit. They were given damages anyway.

9. We later sought to recall a mandate regarding costs, and we were told we could do this by filing a notice of intention to seek certiorari. We filed this notice. On November 20, 1992, we received a letter from Kathleen Grady stating: "They will stay the issuance of the mandate pending the filing and disposition of a Petition for Writ of Certiorari. On December 8, 1992, we received an order allegedly signed by Chief Judge Slovitor, but sent to us by Ms. Jacobsen denying the recall of the mandate.

10. F.R.A.P. 39 requires a bill of costs and an affidavit be filed within fourteen days after judgment.

11. I question all the repetitive letters, orders and their signatures because

they are not signed by the same person, although they all say Dolores Slovitor. This was done with extreme bias, prejudice and intimidation, improper prompting and leniency. I do not believe the other two judges who sat on our appeal even know about these strange actions. I contribute this political three ring circus of tainted and improper pressure to the awesome political power of Mr. McNichol, Mr. Baylson and Senator Specter. I wonder which one of them or their politically connected underlings is responsible for Ms. Jacobsen's and Mr. Baldus' jobs.

12. All of the above is a retaliation against us because we fought for the right to include Mrs. Alberici in the reconsideration appeal against their strenuous, manipulating and intimidating actions. Our supplement to our Motion for Reconsideration of November 9 was completely ignored and never ruled on.

F. Chief Judge Dolores Slovitor and Judges Greenberg and Garth were selected to preside over the appeal in the RICO and civil rights case. Since the court denial of this appeal on October 6, 1992 to December 8, 1992, Judge Slovitor allegedly made several important decisions by herself. These strange and unusual decisions were contrary to the rules, harassing and intimidating because they strenuously objected to my wife being included in the appeal of the RICO and civil rights case. Judge Slovitor presided in two of my appeals en banc; once in 1984 and again in 1987. Both appeals concerned the wrongful conviction of Count Five, the related primary factor of all three cases being appealed to this court. Also, Judge Greenberg presided in one or two of my appeals en banc. Judge Slovitor presided in the civil rights appeal filed May 12, 1992. Somehow she was also selected to preside over my Coram Nobis appeal filed June 15, 1992.

This created a dilemma for her for she either had to decide in our favor or against us in both cases to avoid embarrassment.

1. Both the civil rights appeal and the Coram Nobis appeal briefs contained strong allegations of the above improprieties and many other improprieties with attached exhibits. We stressed the gross appearances of impropriety, partiality, conflict of interest, and bias by the same characters. Judge LaBrum, John McNichol, Judge Pollak, Duane, Morris & Heckscher, Michael Baylson and Senator Specter and their awesome political influence and power involved in these cases.

2. Moreover, before Judge Slovitor denied our reconsideration and supplement thereto, her colleagues in two different courts ruled on two separate cases which are relevant with respect to the appearance of impartiality. Hines v. Liggett Group, Inc., No. 92-5144, and Pfizer v. The Honorable

Judge Kelly, No. 91-1887. These cases tell me that a judge must recuse himself if an appearance of partiality or impropriety exists, regardless of the fact that there was no wrongdoing. Federal law is clear on this. Judges Greenberg, Alito and Aldisert decided Hines. The court en banc overruled the decision allowing Judge Sarokin to continue to preside over the objection of the tobacco industry. They stated: "a judge must recuse himself if an appearance of partiality or impropriety exists., Presiding on my cases in the past were Judges Slovitor, Greenberg, Stapleton and Mansman. Chief Judge Slovitor and Judges Greenberg and Garth presided over my RICO appeal, and Slovitor, Stapleton and Lay presided over the Coram Nobis appeal.

3. We had previously filed a pro se petition seeking the disqualification of Judge Pollak and the entire United States District Court for the Eastern District of Pennsylvania from participation in the

decision on my Coram Nobis petition. I mentioned the conflict of interest, misconduct and prejudicial actions which have the appearance of impropriety and partiality.

4. Besides, I mentioned U.S. Attorney Baylson's connection with Duane, Morris & Heckscher's law firm, and federal Judge Robert Kelly's improper granting of summary judgment against us in 1986.

5. Judge Pollak requested an affidavit for the Disqualification Petition. On April 10, 1990, an Affidavit for Disqualification of Judge Pollak and the entire Eastern District was filed by our attorney, Edward Harkins, Esquire. On the same day, we filed a Supplemental Petition to the Writ of Error Coram Nobis on Harter v. Reliance Insurance Co., 562 A.2d 330 (1989).

6. On April 20, 1990, Judge Pollak decided he had no authority to address questions of disqualification with respect to judges other than himself. He denied our

Motion for Disqualification. He could not decide whether all of the Eastern District should be disqualified. On July 6, 1990, Judge Pollak decided the motion had no merit with respect to himself. He further stated he had no authority to address the disqualification of all judges.

7. After the intentional delay of 21 months for a written order of denial on the Coram Nobis, Mr. Harkin's sent him a reminder. After another intentional delay of six weeks, I filed a Writ of Mandamus in which we mentioned our deep concern of U.S. Attorney Baylson and Judge Robert Kelly. Within seven days, Judge Pollak responded and said he never received our reminder letter. He then gave us his written order denying our petition. Again, Judge Pollak stated he had no authority to rule on the disqualification of all judges. Besides, he stated that he did not know the Coram Nobis petition and the January 13, 1992 letter was in his

possession.

8. The following persons are involved in all three cases: Assistant U.S. Attorneys Strawbridge and Lunkenheimer, the law firm Duane, Morris & Heckscher, U.S. Attorney Michael Baylson, Senator Specter, John McNichol and Judge Kelly.

9. The brief filed in our Coram Nobis appeal sought transfer to another venue because of the appearance of partiality and appearance of impropriety generated by the interaction of the various law firms, public officials and the courts involved.

10. The Appeals Court granted removal of two judges in two separate matters within five weeks of each other for much less improperiety than than of which we have complained. (Hines and Pfizer, supra.)

11. Regardless of the dichotomy and conflict on rulings between the same courts and the rulings on our two appeals, Chief Judge Slovitor and Judges Stapleton and Lay

denied our Coram Nobis appeal on November 14, 1992. Besides, these judges granted us argument on the merits of the case then later denied us argument. The judges in the civil appeal did not grant us argument although we requested it. Judge Slovitor participated with Judge Stapleton in my request for hearing before the court en banc in 1987. The rehearing was for the denial of a section 2255 petition and the abuse of remedy ruling although they said I had new theories. The above improprieties mentioned obviously indicate that Judges Slovitor, Stapleton, Greenberg and Pollak should all have recused themselves for the obvious tainted appearances of impropriety and partiality, conflict of interest, bias and prejudice.

A. Harter, permits recovery of insurance proceeds by Petitioner Joseph Alberici.

B. Harter permits recovery if Petitioner's conviction includes a

determination that he would be guilty of arson.

C. The Superior Court has determined that my conviction for mail fraud did not include as a necessary condition an allegation of or proof of arson.

D. The Superior Court has determined the threshold question but has misapplied the corresponding law.

E. The Superior Court also noted that it appeared I was trying to fight my conviction in the civil case, but absent fraud, perjury or other error, they could not let me do it.

F. I have been arguing fraud, perjury and violations of my constitutional rights. No one is listening. The Supreme Court of Pennsylvania denied me allocatur. I need your help.

G. I have filed RICO, civil rights and other claims. I believe all of these cases are about the same thing, the violation of

our rights to due process, to liberty and property without due process of law. Our rights have been trampled because of the awesome legal and political power wielded by the respondents.

H. The Superior Court erred in ignoring our brief and hundreds of exhibits which indicate constitutional violations, a conviction obtained by fraudulent means and denying our Motion to Strike based upon Pennsylvania black letter law. This was all done without justification.

SHOULD THE JUDGES HAVE RECUSED THEMSELVES FROM THE OBVIOUS AND GROSS APPEARANCES OF IMPROPRIETY, PARTIALITY, CONFLICT OF INTEREST, BIAS AND/OR PREJUDICE AND THE INTERACTION OF THE JUDGES INVOLVED IN THE RELATED CASES AS FOLLOWS:

Judge Van Antwerpen erred when he denied the disqualification of U.S. Attorney Baylson and Duane, Morris & Heckscher. He also erred

in his decision to dismiss the complaint. Also, his biased remarks against me indicate his bias. (Judge Van Antwerpen, in reciting the case history, says I burned down a building. I never did any such thing, and no such thing has ever been alleged or proven.) He should have disqualified himself as soon as he agreed to accept Senator Arlen Specter's offer when he extended an olive branch offering of a prestigious elevation to the Court of Appeals during the time he was considering the merits of our case. Judge Van Antwerpen knew about the tainted influence of our opponents' connections from the pleadings on record and possible inquiries. He should have disqualified himself from presiding in this case because he knew the above created an appearance of impropriety, partiality, conflict of interest and bias.

Incredible and unreal. Political influence and pressure was applied for 14

years in our three cases. Besides the misconduct through the appearances of impropriety, partiality, conflict of interest, bias and/or prejudice and unlawful actions through intimidation and perjury, etc., it appears as if government officials, insurance companies, attorneys and politicians are "ABOVE THE LAW AND JUSTICE." This is a travesty of justice, a national disgrace and outrage. Also, the interaction of the federal district courts, courts of appeals, and court en banc is incredible and unusual and leaves much for the imagination to ponder over. All of this transpired under the color of law and justice against our civil rights.

CONCLUSION

For all of the foregoing reasons, we respectfully request that the Court grant Certiorari and review the Decisions of the Court of Appeals. The facts presented herein

compounded with many improprieties in the entire case history warrants a finding that our most fundamental rights were grossly violated.

Respectfully submitted,

Joseph Alberici

Theresa Alberici

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ALBERICI and THERESA ALBERICI, Husband and Wife, et al., Plaintiffs,	:	Civil Action
vs.	:	
UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE, et al. Defendants	:	No. 91-4870

ORDER

AND NOW, this 13th day of March, 1992, upon consideration of the Motions for Summary Judgment, Motions for Judgment on the Pleadings, and Motions to Dismiss filed by the Defendants in this case, and having carefully considered Plaintiffs' replies to those motions, it is hereby **ORDERED** that each of the Defendants' motions is **GRANTED**, and the Complaint is **DISMISSED WITH PREJUDICE**. Accordingly, Plaintiffs' Motion for Default Judgment against David Soltz, filed January 30, 1992, is **DENIED AS MOOT**. This case is **CLOSED**.

BY THE COURT

/s/ FRANKLIN S. VAN ANTWERPEN
Franklin S. Van Antwerpen, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ALBERICI and THERESA ALBERICI, Husband and Wife, et al.,	:	CIVIL ACTION
Plaintiffs,	:	FILED
vs.	:	MAR 23 1992
UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE, et al.	:	
Defendants	:	NO. 91-4870

AMENDED ORDER OF COURT

AND NOW, this 20th day of March, 1992, this Court's Order of March 13, 1992 is hereby **AMENDED** to include the following:

All outstanding motions are hereby **DISMISSED AS MOOT** at this time.

BY THE COURT

/s/ FRANKLIN S. VAN ANTWERPEN
Franklin S. Van Antwerpen, J.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-1258

JOSEPH ALBERICI, et al.

v.

UNITED STATES GOVERNMENT, et al.

Joseph Alberici,

Appellant

(E.D. Pa., Civil No. 91-04870 (FSVA))

Present: SLOVITER, *Chief Judge,* GREENBERG and GARTH, *Circuit Judges.*

ORDER

Following consideration of the motion by appellees, Bertram Horowitz, J. B. Haas and Young Adjustment Company, for damages and costs pursuant to Rule 38 of the Federal Rules of Appellate Procedure and the appellant's response, it is hereby ordered that the appeal was frivolous within the meaning of Rule 38. Inasmuch as the moving appellees have failed to file an affidavit by September 23, 1992 which sets forth such damages and costs as they choose, as required by the Court's order of September 9, 1992, the motion of these appellees for such damages and costs is denied.

By the Court,

/s/ D. K. SLOVITER

Chief Judge

Dated: October 6, 1992

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

/s/ D. K. SLOVITER
Chief Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

Dated: October 6, 1992

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 92-1258

JOSEPH ALBERICI; THERESA ALBERICI,
Husband and wife;
LA CASA MIA, INC.; STUDIO 19;
VINCENT ALBERICI; ELIZABETH ALBERICI
(LA FAUCI); THERESA O'DONNELL

v.

UNITED STATES GOVERNMENT; DEPARTMENT OF JUSTICE; PETER F. VAIRA, ESQUIRE; DAVID R. STRAWBRIDGE, ESQUIRE; LUTHER E. WEAVER, ESQUIRE; STEPHEN V. WEHNER, ESQUIRE; JOANNE A. EPPS, ESQUIRE; DEPARTMENT OF TREASURY; BARRY F. LORY; DENNIS E. DUTCH; COMMONWEALTH OF PENNSYLVANIA; DEPARTMENT OF STATE POLICE; ATTORNEY GENERAL; WILLIAM L. DI GIAMBERDINI; DELAWARE COUNTY, PENNSYLVANIA; GEORGE T. LEWIS; KENNETH J. BOYDEN, ESQUIRE; SAFEGUARD MUTUAL INSURANCE CO.; BARRY J. GOLDSTEIN, ESQUIRE; PA. INSURANCE GUARANTY ASSOC.; GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORP., LTD.; INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA; J. KENNETH IVORY; QUAKER STATE MUTUAL GROUP; HOME MUTUAL INSURANCE COMPANY OF PENNSYLVANIA; COZEN & O'CONNOR; STEPHEN COZEN, ESQUIRE; YOUNG ADJUSTMENT CO.; BERTRAM HOROWITZ; ULMER & CO., INC.; THEODORE TEPLICK; JOSEPH T. LA BRUM, JR., JUDGE; RITA E. PRESCOTT, JUDGE; WILLIAM R. TOAL, JR., JUDGE; NINO V. TINARI, ESQUIRE; DAVID A. SOLTZ, ESQUIRE; DUANE, MORRIS & HECKSCHER; HUGH M. EMORY, ESQUIRE; MICHAEL

O'HAYER, ESQUIRE; LEONARD TRIGGIANI, SR.; LEONARD TRIGGIANI, JR.; BOROUGH OF DARBY, PENNSYLVANIA; THOMAS J. POWERS; J.B. (JOYCE BROWN) HAAS

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* GREENBERG and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellant Joseph Alberici in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ D. K. SLOVITER
Chief Judge

Dated: November 5, 1992

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH ALBERICI 1753 Marilyn Drive Havertown, PA 19083 Petitioner	:	NO. 92-1247
v.	:	
UNITED STATES OF AMERICA United States Courthouse Sixth and Market Streets Philadelphia, PA 19106 Respondent	:	
and	:	
THE HONORABLE LOUIS H. POLLAK United States District Court Eastern District of Pennsylvania Sixth and Market Streets Philadelphia, PA 19106 Nominal Respondent	:	

ANSWER OF NOMINAL RESPONDENT LOUIS H. POLLAK TO WRIT IN MANDAMUS

I

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. It is admitted that a hearing was held on July 6, 1990. Following the hearing, nominal respondent Pollak rendered an opinion from the bench at the conclusion of which he stated:

> Accordingly, for the reasons recited I conclude that the petition of Mr. Alberici for a Writ of Coram

Vobis [*sic*] should be denied; and I will enter a written order to that effect.

6. It is admitted that nominal respondent Pollak is familiar with the case of petitioner Joseph Alberici.

7. It is admitted that petitioner's Writ of Error Coram Nobis raised several issues.

8. It is admitted that nominal respondent Pollak did not "enter a written order" denying petitioner Alberici's petition for a Writ of Error Coram Nobis, as nominal respondent Pollak stated he would at the close of the hearing on July 6, 1990. As noted in paragraph 5, *supra*, nominal respondent Pollak did render a bench opinion on July 6, 1990.

9. Admitted.

10. Nominal respondent Pollak is without information sufficient to form a belief as to the truth of the matter alleged.

11. It is admitted that petitioner Alberici filed a motion to disqualify all of the judges of the United States District Court for the Eastern District of Pennsylvania. Nominal respondent Pollak concluded that he was without authority to rule on the motion except as it related to him.

12. Nominal respondent Pollak is without information sufficient to form a belief as to the truth of the matter alleged.

II

Yesterday, April 6, 1992, there was for the first time brought to the attention of nominal respondent Pollak (1) petitioner Alberici's Writ in Mandamus, and (2) the letter of January 13, 1992, of Edward C. Harkin, Esq., counsel for petitioner Alberici, to nominal respondent Pollak. For his nearly three-month's non-awareness and non-acknowledgement of Mr. Harkin's letter, nominal respondent Pollak must take responsibility. On becoming advised of the filing in the Court of Appeals of the Writ of Mandamus, nominal respondent Pollak caused

an examination to be made of the records of the District Court in petitioner Alberici's case. That examination disclosed that (1) a hearing on Mr. Alberici's petition for a Writ of Error Coram Nobis was held on July 6, 1990, (2) the transcript of that hearing contains a bench opinion reviewing petitioner Alberici's contentions and concluding "that the petition of Mr. Alberici for a Writ of Coram Vobis [*sic*] should be denied." (A copy of the bench opinion, which constitutes pages 36 to 53 of the July 6, 1990 transcript, is annexed hereto as appendix A.) The transcript also discloses that nominal respondent Pollak then stated that he would "enter a written order to that effect." Such written order was not entered.

Pursuant to his discovery yesterday, April 6, 1992, that a written order had not been entered, nominal respondent Pollak has this day entered an order, *nunc pro tunc*, denying Mr. Alberici's petition for a Writ of Error Coram Nobis. (A copy of that *nunc pro tunc* order is annexed hereto as appendix B.)

/s/ LOUIS H. POLLAK
Louis H. Pollak

April 7, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
	:	FILED
v.	:	APR 07 1992
	:	
JOSEPH ALBERICI	:	NO. 82-267

MEMORANDUM/ORDER

POLLAK, J. APRIL 7, 1992

On July 6, 1990, a hearing was held on the petition of Joseph Alberici for a Writ of Error Coram Nobis. Following the arguments of counsel, a bench opinion was presented at the close of which the court stated:

> Accordingly, for the reasons recited I conclude that the petition of Mr. Alberici for a Writ of Coram Vobis [*sic*] should be denied; and I will enter a written order to that effect.

The written order denying Mr. Alberici's petition was never filed. Accordingly, to remedy that deficiency, it is hereby ORDERED and DIRECTED, *nunc pro tunc*, that the petition of Joseph Alberici for a Writ of Error Coram Nobis is DENIED for the reasons stated from the bench on July 6, 1990.

/s/ POLLAK
POLLAK, J.

APRIL 7, 1992

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1295

UNITED STATES OF AMERICA

Appellee

v.

JOSEPH ALBERICI

Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Criminal Action No. 82-00267-01)
District Judge: Honorable Louis H. Pollak

Submitted Under Third Circuit Rule 12(6)
November 3, 1992

BEFORE: SLOVITER, Chief Judge, STAPLETON, and LAY, Circuit Judges

---

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit:

1. Whether the evidence was sufficient to prove use of the U.S. Mails where the conviction was based on testimony by a public adjustor representing appellant who said that the letter is one "that . . . sends our claim . . .";

---

* Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

2. Whether the evidence which was presented at trial was different evidence than that presented to the Grand Jury and which was falsified by the government;

3. Whether the government's prosecution was tainted by its alleged failure to disclose exculpatory evidence, by its coercion of government witnesses, and by its casual amendment of the evidence;

4. Whether the government and the court below failed to adequately protect appellant's right to due process by not properly advising him of the involvement of his defense counsel in related matters, defense counsel's quest for immunity from the government, and the fact that his defense counsel was not able to function as an independent attorney so as to protect appellant's rights;

5. Whether the trial judge improperly tainted or interfered with the jury by entering the jury deliberation room during the jury's deliberation;

6. Whether the indictment against appellant was so legally insufficient, so improperly framed, and so grossly in error as to fail to prove either a scheme or to properly state any charges against appellant; and

7. Whether the government had jurisdiction to investigate the fire,

IT IS ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: NOV 24, 1992

1515

No. 92-1369

Supreme Court
FILED
APR 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH ALBERICI and THERESA ALBERICI, h/w,
Petitioners

v.

UNITED STATES GOVERNMENT, et al.,
Respondents

JOSEPH ALBERICI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DELAWARE COUNTY AND GEORGE T. LEWIS

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26 pp

QUESTIONS PRESENTED

I. Whether the Court below properly affirmed the dismissal of Petitioners' entire Complaint without granting leave to amend.

II. Whether the Court below properly affirmed the dismissal of Petitioners' RICO claims as barred by the applicable Statute of Limitations.

III. Whether the Court below properly affirmed the dismissal of Petitioners' Civil Rights claims as barred by the applicable Statute of Limitations.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH ALBERICI and THERESA ALBERICI, h/w,
Petitioners

v.

UNITED STATES GOVERNMENT, et al.,
Respondents

JOSEPH ALBERICI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DELAWARE COUNTY AND GEORGE T. LEWIS

OPINIONS BELOW

The instant Petition for Writ of Certiorari has been taken from the Order of the United States Court of Appeals for the Third Circuit in Case No. 92-CD-1258

dated November 5, 1992, denying the Petition for Rehearing filed by Appellant, Joseph Alberici. The text of this Order is set forth as Appendix B to the Consolidated Petition for Writ of Certiorari.

The Appeal below was taken from the Order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 91-4870, dated March 13, 1992, and amended March 20, 1992, dismissing Plaintiffs' Complaint with prejudice, and dismissing all outstanding Motions. True and correct copies of the Order and Amended Order of the District Court are attached to the Consolidated Petition for Writ of Certiorari as Appendix A.

Any other Order concerned with the instant Petition is from an action to which Respondents were not a party.

COUNTERSTATEMENT OF THE CASE

The Complaint below was brought by Petitioners against forty-three Defendants, including individuals, insurance companies, municipalities and government prosecutors. Among the named Defendants were Respondents, Delaware County (a municipality) and George T. Lewis, an agent of said municipality. This Complaint contains broad, conclusory allegations that the various Respondents (Defendants below) conspired amongst themselves and with others to either fabricate evidence used at the criminal trial of Petitioner, Joseph Alberici, or otherwise attempt to harass and defraud the Petitioners. The various counts in the Complaint included alleged violations of: the Racketeering Influence and Corrupt Organization Act, 18 U.S.C. §1964 (hereinafter "RICO"); the Civil Rights Act, 42 U.S.C. §1983; Federal Anti-Trust Laws under 16 U.S.C. §1 *et seq.*; and the State Law Torts of Libel, Slander and Intentional Infliction of Emotional Distress. (*See* Appendix of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania [hereinafter App. of Appeal] at 41-43).

Petitioner, Joseph Alberici, was indicted in 1982 on six counts of mail fraud, based upon evidence that he brought about the arson of the Jerry Lewis Theater in Aston, Pennsylvania in order to collect insurance proceeds. (App. of Appeal at 48-49). Prior to the fire at the Jerry Lewis Theater, Petitioner, Joseph Alberici, had entered into an agreement to purchase this property, and had obtained several fire insurance policies on it. (App. of Appeal at 16-17). He was found guilty of all six counts of mail fraud and was sentenced to a twenty month prison term on November 9, 1983. (App. of Appeal at 17). Petitioner was eventually granted a new trial on five of the six counts of mail fraud, but his conviction on count five of the indictment was sustained. (App. of Appeal at 30). On January 8, 1985, Petitioner, Joseph Alberici, filed a Motion for a New Trial alleging newly discovered evidence. Although he was granted ten hearings on this Motion, it was eventually denied on August 9, 1985. (App. of Appeal at 49). On June 27, 1987, the United States Court of Appeals for the Third Circuit upheld Alberici's conviction. *Id.* Nowhere in their Complaint do Petitioners show that any criminal proceedings were terminated in favor of Petitioner, Joseph Alberici, in a manner absolving him of guilt.

The Complaint in this matter also includes allegations surrounding a civil suit filed by Petitioners, Joseph and Theresa Alberici, against various insurance companies, who are also Respondents herein. (App. of Appeal at 17). Petitioners sought to recover insurance money for the damage to the Jerry Lewis Theater caused by the fire for which Joseph Alberici was eventually found responsible. Petitioners have not made any allegations that Respondents, Delaware County and George T. Lewis, were involved with those civil proceedings. Petitioners have now added some new allegations against these Respondents in their Petition for Writ of Certiorari to this Honorable Court. These factual allegations in the

Petition should not be considered, as they were not part of the record below.

Respondents, Delaware County and George T. Lewis, filed a Motion to Dismiss Petitioners' Complaint below pursuant to Federal Rule of Civil Procedure 12(b)(6) on or about October 18, 1991. This Motion was granted by the Order of the Honorable Franklin S. Van Antwerpen, entered March 13, 1992 and supplemented by Order entered March 20, 1992.

SUMMARY OF THE ARGUMENT

Petitioners have failed to set forth in their Petition sufficient reasons why this Honorable Court should review the Order of the Court of Appeals in this matter. The claims against Respondents, Delaware County and George T. Lewis, were dismissed following their Motion to Dismiss in this matter because the Court found that all of their claims were barred by the applicable Statutes of Limitations. In addition, the Court found that Petitioners could not possibly state any viable cause of action against Respondents. The Court below therefore declined to grant Petitioners leave to amend their Complaint.

The claims of Petitioners below were properly dismissed as barred by the applicable Statutes of Limitations. Petitioners' Complaint included claims under the Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. §1964. Petitioners failed to allege any elements of a RICO cause of action occurring within the four year Statute of Limitations. In addition, Petitioners' allegations did not even amount to sufficient predicate offenses necessary for a RICO claim. Finally, a RICO cause of action cannot be maintained against Respondent, Delaware County, as it is a municipality.

The Complaint in question also contained claims under the Civil Rights Act, 42 U.S.C. §1983. Such claims are governed by the state Statute of Limitations for personal injury actions, which in Pennsylvania is two

years. Petitioners failed to allege any conduct by Respondents occurring within two years of the filing of their Complaint which could support an action for civil rights violations.

The remainder of the instant Petition deals with Petitioner, Joseph Alberici's criminal case, or with other allegations that have nothing to do with Respondents herein. For this reason, Respondents will not address them in their Brief.

REASONS FOR DENYING THE PETITION

Pursuant to the Rules of this Honorable Court, a review on Writ of Certiorari will not be granted as a matter of right, but rather only by exercise of judicial discretion when there are "special and important reasons" supporting such review. Sup. Ct. R. 10.1. The Rules of the Supreme Court set forth examples of cases where review on a Writ of Certiorari will be considered. Sup. Ct. R. 10.1(a)-(c). These examples are as follows:

(a) When the United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with the state Court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this court's power of supervision.

(b) When a state Court of last resort has decided a federal question in a way that conflicts with a decision of another state Court of last resort or of a United States Court of Appeals.

(c) When a state Court or United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

> question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1.

In the instant case, Petitioners have set forth many allegations in their Petition, some of which relate to the case below, and some of which are new. To the extent that the claims in the Petition relate to the denial of Petitioners' request for a Writ of Coram Novis, Respondents will not comment, since they are not parties to that case. To the extent that the Petition in question refers to the Order affirming the dismissal of Petitioners' Civil Action against Respondents, Petitioners have failed to set forth any sufficiently special or important reasons why this Court should then grant review on Writ of Certiorari. Nowhere have Petitioners alleged that the ruling of the Court of Appeals was in conflict with a decision of any other United States Court of Appeals on the same matter, or with a state Court of last resort. Petitioners also do not indicate anywhere that the Court of Appeals departed from the accepted course of judicial proceedings in issuing its Order affirming the dismissal of their Complaint. Finally, Petitioners point to no important question of federal law which needs to be resolved by this Honorable Court.

It is obvious from the instant Petition that Petitioners are dissatisfied with the ruling of the United States Court of Appeals for the Third Circuit in their civil action. They have attempted to add additional facts which were not part of the record below in an attempt to further prove the merits of their claims. The fact remains, however, that their Complaint was dismissed by the District Court for failure to state any cause of action upon which relief could be granted against any of the Defendants below. (App. of Appeal at 63). The addition of other facts at this stage is improper. Also, even these additional facts do not offer this Honorable Court a sufficient reason why it should review the decision of the Court of Appeals.

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' ENTIRE COMPLAINT WITHOUT GRANTING LEAVE TO AMEND.

The United States District Court for the Eastern District of Pennsylvania dismissed Petitioners' entire Complaint with prejudice, as it found that each of their claims was barred by the applicable Statute of Limitations. (App. of Appeal, at 56, 59, 61, 62). In addition to the fact that claims were time-barred, the District Court noted that Petitioners did not state a single claim for relief, and declined to give them leave to amend their Complaint because it did not find: ". . . any reason to believe that a well-founded action could be stated . . ." (App. of Appeal at 63). In addition, the Court found that there was "an element of harassment" present in the filing of this Complaint by Petitioners. *Id.*

Petitioners have argued that they should have been allowed to amend their Complaint following the District Court's dismissal of the action for failure to state a claim. (Petition, pp. 38-39). As noted above, the District Court did not actually base its dismissal on Petitioners' failure to state a claim, but rather on the various Statutes of Limitations. The Court did, however, clearly indicate that it would not grant Petitioners leave to amend, because it found no way in which they could possibly state a claim for relief. (App. of Appeal at 63).

In support of their claim that they should have been granted leave to amend, Petitioners have cited the case of *Sidbotham v. Robison,* 216 F.2d 816 (9th Cir. 1954). In this case, the Court of Appeals for the Ninth Circuit noted that a Court should allow amendment to a pleading if: ". . . it is shown that other facts exist, which if alleged, would cure the defect." *Id.* at 826 [citations omitted]. The instant case is distinguishable from *Sidbotham* because here it is clear that the District Court felt that no other facts could be shown or pled which would cure the defects in Petitioners' Complaint. This is

especially evident because the trial Court went so far as to use the phrase "element of harassment" in referring to Petitioners' Complaint. (App. of Appeal at 63). The Court also clearly stated why it believed that Petitioners could not possibly state a well-founded cause of action. (App. of Appeal at 56, 61-62). While these explanations may be brief, they adequately serve to inform Petitioners and this Honorable Court of the reasons for the Court's dismissal of this action with prejudice. With respect to Petitioners' RICO claims, the Court notes that:

> . . . the Complaint fails to allege a RICO enterprise or enterprises, fails to allege any predicate act sufficient to constitute a pattern of racketeering activity, fails to overcome the judicial and prosecutorial immunities of many of the defendants and the *res judicata* affect of the judgment against Joseph Alberici in both the District Court and the Pennsylvania Court of Common Pleas.

App. of Appeal at 56.

With respect to Petitioners' claims under the Civil Rights Act, 42 U.S.C. §1983, the District Court noted that:

> The Complaint does not sufficiently allege that the non-state actors acted under color of state law. It does not overcome the traditional privilege granted to pleadings in judicial proceedings, it relies on facts which have already been decided against Plaintiffs in other judicial decisions which must be given preclusive effect, nor does it overcome judicial and prosecutorial immunities of many of the defendants.

App. of Appeal at 61.

Finally, with respect to Petitioners' state law claims for Libel, Slander and Intentional Infliction of Emotional Distress, the District Court noted that any allegations in the Complaint occurring after July 31, 1989 consist of statements made in pleadings and judicial opinions which are recorded in absolute privilege under Pennsylvania law. (App. of Appeal at 62-63).

In their Motion to Dismiss the Complaint in this matter, Respondents, Delaware County and George T. Lewis, demonstrated how Petitioners failed to state a claim under the RICO statute, 18 U.S.C. §1964, because they did not allege any acts by either Delaware County or George T. Lewis which established a "pattern of racketeering activity." In fact, Petitioners did not attribute any *specific act* to Respondent, George T. Lewis. In addition, Petitioners failed to establish the existence of an "enterprise" being conducted or supported through racketeering activity. *See* 18 U.S.C. §1962. Also, with respect to Respondent, Delaware County, a RICO action cannot be maintained, as this Respondent is a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991). Petitioners failed to plead a sufficient cause of action against Respondents under 42 U.S.C. §1983 because they did not plead sufficient violations of their constitutional rights to support such an action, and also because they failed to meet the pleading requirement to establish liability against a municipality. Pleading requirements to establish liability for a violation of civil rights against a municipality were explained by the United States Court of Appeals for the Third Circuit in *Andrews v. City of Philadelphia,* 895 F.2d 1469 (3rd Cir. 1990). Finally, Petitioners failed to plead violations of state tort law against Respondents which overcame the immunity traditionally granted to municipal entities and their employees under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541 *et seq.*

For the above-stated reasons, Respondents, Delaware County and George T. Lewis, submit that the United States Court of Appeals properly affirmed the Order of the District Court dismissing Petitioners' Complaint with prejudice.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S CONCLUSION THAT PETITIONERS' RICO CLAIMS WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

As was noted by the Honorable Franklin S. Van Antwerpen of the United States District Court for the Eastern District of Pennsylvania, this Honorable Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1957), held that the four year Statute of Limitations applicable to suits under the Clayton Act should also be applied to RICO actions. (App. of Appeal at 53). Although this Honorable Court did not decide when the limitations period would begin, the Third Circuit established that the period would run from the time that "the Plaintiff knew or should have known that the elements of the civil RICO cause of action existed." *Keystone Insurance Company v. Houghton,* 863 F.2d 1125, 1126 (3rd Cir. 1988). The *Houghton* Court also added that if a further injury or further predicate act were to occur, the cause of action would accrue from the time when the Plaintiff knew or should have known of the "last injury or predicate act which is part of the same pattern of racketeering activity." *Id.* at 1130.

The District Court observes that Petitioners' Complaint really alleged two separate "plots" against them, one dealing with the criminal prosecution of Joseph Alberici and one dealing with the civil suit by Joseph and Theresa Alberici against the insurance companies. (App. of Appeal at 54-55). The only allegations in the Complaint against Respondents, Delaware County and George T. Lewis, which could even possibly fall within the definition of racketeering activity set forth in the RICO Statute are acts which occurred prior to the 1983 conviction and sentencing of Joseph Alberici. (App. of Appeal at 18-19, 21-22 and 41). Petitioners have made no allegations that Respondents, Delaware County or George T. Lewis, had any involvement with their civil

action in the Court of Common Pleas of Delaware County, or that they engaged in any conduct which would constitute the "racketeering activity" after 1983. Since Petitioners' Complaint was not filed until July of 1991, their RICO claims were clearly barred by the Statute of Limitations and were correctly dismissed by the District Court. Also, the District Court clearly did not even find these allegations sufficient to constitute predicate offense as necessary for a RICO claim. (App. of Appeal at 55).

In addition, even if Petitioners' claims under the RICO statute were not time-barred and did not constitute predicate offenses under RICO, they would not be able to maintain a cause of action for RICO violations against Respondent, Delaware County, as it is a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991). In the *Genty* case, the United States Court of Appeals for the Third Circuit became the first appellate court to hold that an action brought under 18 U.S.C. §1964(c) cannot be maintained against a municipality. *Id.* In so holding, the *Genty* Court noted that since the statute includes a mandatory recovery of treble damages, the primary purpose behind it was punitive. *Id.* at 914. The Court recognized that municipalities have traditionally been exempt from punitive damages, absent expressed statutory provisions to the contrary. 937 F.2d at 910. The rationale behind this exemption is that a municipality is incapable of committing a criminal act itself. *Id.* at 911. Another consideration is the fact that the only ones to really be "punished" would be the innocent taxpayers. *Id.*

For the above-stated reasons, Respondents submit that the Court of Appeals correctly affirmed the District Court's dismissal of Petitioners' RICO claims against Respondents, Delaware County and George T. Lewis, as being barred by the Statute of Limitations. Even if said claims were not barred, they could not be maintained against Respondent, Delaware County, as it is a municipality, and is therefore exempt from punitive awards.

Also, Petitioners failed to state a viable claim for RICO violations against either of these Respondents, so their Complaint was properly dismissed with prejudice.

III. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' CIVIL RIGHTS CLAIMS AS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

This Honorable Court has held that §1983 actions are governed by the state statutes of limitations for personal injury actions. *Wilson v. Garcia,* 471 U.S. 261, 278-280, 105 S.Ct. 1398, 1349 (1985). The Pennsylvania statute of limitations for personal injury actions is two years. 42 Pa. C.S.A. §5524(2). In its opinion, the District Court noted that unlike the accrual rule in a RICO action, for a civil rights action, the date when a cause of action accrues is "the date on which Plaintiffs knew or had reason to know of the injury that constitutes the basis of this action." (App. of Appeal at 57, *citing Deary v. Three Unnamed Police Officers,* 746 F.2d 185, 197 (3rd Cir. 1984)). The Court went on to state that it could tell from the face of the Complaint that Petitioners should have known of any injuries relating to the criminal persecution of Joseph Alberici by the date of his criminal conviction in 1983. (App. of Appeal at 57, *citing Syre v. Commonwealth of Pennsylvania,* 662 F. Supp. 550, 553-554 (E.D. Pa. 1987), *affirmed* 845 F.2d 1015 (3rd Cir.), *cert. denied* 488 U.S. 853, 109 S.Ct. 139 (1988)).

In their Brief to the Court of Appeals, and in the instant Petition, Petitioners have argued that their filing was timely as to civil rights violations, because of alleged fraudulent citations and warrants which they claim were issued between June 18, 1990 and December 5, 1990 by Respondents. (Appellants' Brief, p. 16 and Petition, p. 41). The actual paragraph in Petitioners' Complaint refers to citations and warrants, but does not mention

the dates of the citations and warrants, nor does it adequately explain how these alleged citations and warrants were related to the prior conviction of Joseph Alberici, or to the civil action filed against the insurance companies. (App. of Appeal at 41). Even if the Complaint had mentioned the dates of these alleged actions, this paragraph is insufficient to state a cause of action for a violation of 42 U.S.C. §1983, because it fails to meet the heightened pleading requirement established by the United States Court of Appeals for the Third Circuit for civil rights actions. *See Hall v. Pennsylvania State Police,* 570 F.2d 86 (3rd Cir. 1978); *Agresta v. City of Philadelphia,* 694 F.Supp. 117, 119-120 (E.D. Pa. 1988).

The District Court also noted that the Statute of Limitations for Petitioners' civil rights claim was not tolled under the Doctrine of Fraudulent Concealment because Petitioners never claimed in their Complaint that any conduct was concealed from them, or that they discovered it only recently. (App. of Appeal at 59). The Court further stated that Petitioners allege no due diligence in investigating the conduct and trying to discover the claims from the time the alleged actions occurred until the time they filed their Complaint. *Id.* In its Memorandum Opinion, the District Court made clear that there are certain elements which Petitioners must allege in their Complaint in order to benefit from the Doctrine of Fraudulent Concealment. (App. of Appeal at 58, *citing Bethlehem Steel Corp. v. Fischbach & Moore, Inc.,* 641 F.Supp. 271, 273 (E.D. Pa. 1986)). Petitioners clearly failed to meet the standards in their Complaint, and did not even attempt to set forth any facts in their Brief or in the instant Petition which would give this Honorable Court reason to reverse the decision of the Court of Appeals on the basis of fraudulent concealment. Therefore, the Order of the United States Court of Appeals affirming the trial Court's dismissal of Petitioners' claims on the basis of the Statute of Limitations must be affirmed.

IV. RESPONDENTS NEED NOT ADDRESS PETITIONERS' CLAIMS WHICH INCLUDE FACTS NOT OF RECORD BELOW, OR WHICH RELATE TO ACTIONS WHICH THEY ARE NOT A PARTY OR ACTIONS OCCURRING AFTER THE FILING OF THE INSTANT LAWSUIT.

As has been explained above, Petitioners' Complaint against Respondents, Delaware County and George T. Lewis, was dismissed because the facts as pled did not state a cause of action against these Respondents which fell within the applicable Statutes of Limitations, or which was sufficiently plead so as to indicate that Petitioners were entitled to any relief. Petitioners cannot now allege new facts which were not of record below. Also, Petitioners have added allegations as to incidents which occurred after the filing of their Appeal with the United States Court of Appeals for the Third Circuit. These claims mention individuals and/or entities which are not parties to the instant action. For this reason, these allegations should not be considered by this Honorable Court, and Respondents need not comment on them any further.

CONCLUSION

For the above-stated reasons, Respondents, Delaware County and George T. Lewis, respectfully request that this Honorable Court deny Petitioners' Petition for Writ of Certiorari in the matter of *Joseph and Theresa Alberici v. United States Government, et al.* (U.S. Court of Appeals No. 92-1258). Respondents also respectfully request that this Honorable Court award costs and sanctions, including but not limited to attorney's fees, against Petitioners and in favor of Respondents.

Respectfully submitted,
HOLSTEN & WHITE

BY: _____
WILLIAM F. HOLSTEN, II, ESQUIRE
Attorney for Respondents,
Delaware County and George T. Lewis

Date: April 12, 1993

No. 92-1515

Supreme Court, U.S.
FILED
APR 16 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W,

Petitioners,

v.

UNITED STATES GOVERNMENT, et al.,

Respondents.

JOSEPH ALBERICI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Consolidated Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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I. COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Are there special and important reasons for granting the Petition for Writ of Certiorari requested by Petitioners Joseph and Theresa Alberici?

A. Did the Court of Appeals properly affirm the District Court's determination that Plaintiffs' claims are all barred by the applicable statute of limitations?

B. Does the Court of Appeals' affirmance of the District Court's determination that the Plaintiffs' claims are barred by the statute of limitations present substantial issues warranting an exercise of this Court's discretionary jurisdiction?

II. PARTIES TO THE PROCEEDINGS

Joseph Alberici and Theresa Alberici,
Petitioners

United States Government Dept. of Justice
David R. Strawbridge, Esq.
Stephen V. Wehner, Esq.
United States Government Dept. of Treasury
Barry F. Lorry,
Commonwealth of Pennsylvania Dept. of State Police and Attorney General
William L. Di Gaimberdeni,
George T. Lewis,
Safeguard Mutual Insurance Co.
Pa. Insurance Guaranty Assoc.
Insurance Placement Facility of Pennsylvania
J. Kenneth Ivory
Home Mutual Insurance Co. of PA
Stephen Cozen, Esq.
Bertram Horowitz
Theodore Teplick
Rita E. Prescott, Judge
Nino V. Tinari, Esq.
Duane, Morris & Heckscher
Michael O'Hayer, Esq.
Leonard Triggiani, Jr.
Thomas J. Powers
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Joann A. Epps, Esq.
Dennis E. Dutch
Delaware County, PA.
Kenneth J. Boyden, Esq.
Barry J. Goldstein, Esq.
General Accident Fire & Life Ins. Corp., Ltd.
Quaker State Mutual Group
Cozen & O'Connor

PARTIES TO THE PROCEEDINGS – Continued

Young Adjustment Co.
Ulmer & Co., Inc.
Joseph T. LaBrum, Judge
William R. Toal, Judge
David A. Soltlz, Esq.
Hugh M. Emory, Esq.
Leonard Triggiani, Sr.
Borough of Darby, PA
J. B. (Joyce Brown) Haas

Respondents

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V. REFERENCES TO THE OPINIONS AND JUDGMENTS BELOW

Petitioners seek review of the dismissal of their action for monetary damages. The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, dismissing the Plaintiffs' Complaint (which alleged claims of anti-trust, civil rights, RICO, and state tort law violations) is reproduced in the Appendix attached hereto as Exhibit "A". The Order of the U.S. Court of Appeals for the Third Circuit affirming the dismissal of the Complaint is attached hereto as Exhibit "B". There have been no other opinions or judgments regarding the Petitioners' action for monetary damages.

Petitioner, Joseph Alberici, also seeks review of the District Court's refusal to grant a Writ of Error Coram Nobis. The Petition for Writ stems from Mr. Alberici's prosecution and conviction for mail fraud. The District Court's Opinion denying post-trial motions is reported at 618 F. Supp. 660 (E.D. Pa. 1985). His conviction was affirmed on direct appeal to the Court of Appeals for the Third Circuit, 735 F.2d 135 (3rd Cir. 1989) (unpublished opinion) and his subsequent Petition for Writ of Certiorari was denied by this Court, 469 U.S. 1072 (1984).

Not content, Petitioner Joseph Alberici, filed a motion in the nature of a request for writ of habeas corpus, under 28 U.S.C. §2255. That petition was denied by an unpublished Memorandum and Order dated December 2, 1986. The denial of the §2255 motion was affirmed by the Court of Appeals in an unpublished Memorandum on June 25, 1987.

Respondents herein are parties to the Petitioner's action for monetary damages, only.

VI. STATEMENT OF JURISDICTION

Jurisdiction lies with this Court, pursuant to 28 U.S.C. §1254.

VII. CITATION OF RELEVANT STATUTES

42 Pa.C.S. §5523 provides, in pertinent part, as follows:

> **One Year Limitation**
>
> The following actions and proceedings must be commenced within one year:
>
> (1) an action for libel, slander or invasion of privacy.

42 Pa.C.S. §5524 provides, in pertinent part, as follows:

> **Two Year Limitation**
>
> The following actions and proceedings must be commenced within two years:
>
> * * *
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

VIII. COUNTERSTATEMENT OF THE CASE

A. Procedural History

The Respondents filing this brief are Safeguard Mutual Insurance Company ("Safeguard"), Pennsylvania Insurance Guaranty Association ("PIGA"), General Accident Fire and Life Insurance Corporation ("General Accident"), Quaker State Mutual Insurance Group ("Quaker State"), Home Mutual Insurance Company of Pennsylvania ("Home"), Duane, Morris & Heckscher ("DM&H"), Hugh M. Emory, Esquire ("Emory"), and Michael O'Hayer, Esquire ("O'Hayer"). Collectively, these parties will be referred to as the "insurers and their attorneys." Safeguard, PIGA, General Accident, Quaker State, and Home will be referred to as the "insurers," where appropriate.

Petitioners, hereafter sometimes referred to as Plaintiffs, filed their *pro se* Complaint seeking $30 million in damages on theories ranging from violation of the civil RICO statute, violation of civil rights statutes, anti-trust violations, defamation, and intentional infliction of emotional distress, on or about July 31, 1991. The gravamen of the complaint asserts that the 42 defendants conspired to ensure that plaintiff, Joseph Alberici, was falsely charged with arranging the destruction by fire of the Jerry Lewis Theatre in Aston, Pennsylvania, a theatre which Mr. Alberici was in the process of purchasing. The complaint also asserts that several of the defendants committed various improprieties in their defense of a civil suit brought by the Albericis to recover fire insurance proceeds from polices covering the theatre.

The plaintiffs are Mr. Alberici, his wife and children, and two corporations believed to be owned by, or at least under the control of, Mr. Alberici or members of his family. The 42 defendants include, but are not limited to, the federal officers and attorneys who investigated and prosecuted the mail fraud case brought against Mr. Alberici; the insurance companies which refused to pay the fire loss claims submitted by Mr. Alberici; the attorneys who defended against Mr. Alberici's civil suit to recover the insurance proceeds; various state court judges who ruled upon questions raised in Mr. Alberici's civil action, some of the attorneys who represented Mr. Alberici in his criminal case, and others.

In the District Court, each of the defendants filed motions to dismiss, for judgment on the pleadings, or for summary judgment, in response to the complaint. Defendants Cozen & O'Conner, Young Adjustment Company, Stephen A. Cozen, Bertram Horowitz, and J.B. Haas were dismissed by order dated September 25, 1991. The remaining defendants were dismissed, by virtue of the District Court's dismissal of the complaint, by order dated March 13, 1992. That order was entered on the docket on March 17, 1992. The District Judge, in his opinion, noted that an element of harassment was present in the Plaintiffs' prosecution of this action. The Court of Appeals for the Third Circuit affirmed the dismissal of the Complaint by Judgment Order dated October 6, 1992. By Order issued that date, the Court of Appeals also determined that the Plaintiffs' appeal was "frivolous within the meaning of [Fed.R.App.P] 38".

B. Factual History

In May of 1977, plaintiff Joseph Alberici entered into an agreement of sale for the purchase of the Jerry Lewis Theatre, located in Aston, Pennsylvania. The purchase price was $210,000 and title was to be taken either in Mr. Alberici's name, or by his "nominee." Mr. Alberici thereafter insured the theatre in an amount in excess of $500,000.00.

On August 6, 1977, before closing on the sale of the theatre, a fire broke out substantially destroying the building and its contents. Believing that the cause of the fire was incendiary in nature, the insurers covering the theatre refused to honor Mr. Alberici's demands for payment. Mr. Alberici, therefore, commenced a civil action in the Court of Common Pleas of Delaware County, Pennsylvania, against the insurers. Mr. Alberici's wife, Theresa, was also named as a plaintiff.

Meanwhile, the cause of the fire was a subject of interest for investigators at the FBI, as well as at the Bureau of Alcohol, Tobacco, and Firearms. Believing the fire to be similar in nature to a number of other fires that had recently occurred in several East Coast states, and which were then under investigation, these federal agencies commenced an investigation into the Jerry Lewis Theatre fire. The investigation culminated in an indictment being handed up, charging Mr. Alberici with hiring arsonists to intentionally burn the theatre, so that he could collect the insurance proceeds.

The indictment charged Mr. Alberici with mail fraud, in that he used the mails to submit proofs of loss to the

insurers which represented that the cause of the fire was "unknown to insureds." Mr. Alberici was ultimately found guilty by a jury of all six Counts of the mail fraud indictment. As a result of procedural defects, judgment and sentence were only imposed on him based on one of the mail fraud counts. However, as is obvious from the criminal record, a necessary finding for the conviction, judgment, and sentence was that Mr. Alberici had in fact procured the arson of the theatre, and had fraudulently attempted to collect the insurance proceeds.

Mr. Alberici's efforts to gain a reversal of his criminal conviction have been fruitless. On direct appeal from his Judgment of Sentence to the Court of Appeals for the Third Circuit, the Judgment was affirmed, by order dated May 15, 1984. A petition for rehearing was denied by that court, on June 14, 1984.[1] This Court denied Mr. Alberici's Petition for Writ of Certiorari, as well, on December 3, 1984. 469 U.S. 1072.

When direct attack on the conviction proved unsuccessful, Mr. Alberici turned to collateral attack. In all, Mr. Alberici has filed three motions for a new trial, a Motion under 28 U.S.C. §2252, and the presently pending Petition for Writ of Error Coram Nobis with the District Court. His third motion for new trial, alleging newly discovered evidence, was filed on January 8, 1985. His motion, pursuant to 28 U.S.C. §2255, alleging ineffective assistance of counsel, newly discovered evidence, and prosecutorial

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[1] The direct appeal to the Court of Appeals was docketed under number 83-1841.

misconduct in the form of failure to disclose exculpatory material, was filed in February, 1986.

The third new trial motion was denied by the District Court on August 9, 1985, 618 F. Supp. 660 (1985). The motion under §2255 was denied by the District Court, in an opinion dated December 2, 1986. Interestingly, District Judge Pollack's opinion denying the §2255 motion notes that Mr. Alberici argued that there was "an alleged connection between a civil case brought by defendant against his insurance carrier and defendant's federal prosecution". Apparently, Mr. Alberici contended that "the government caused the civil case to be delayed in order to avoid giving defendant access to certain evidence."

Mr. Alberici withdrew his appeal from the denial of the third new trial motion. His appeal from denial of the §2255 motion resulted in affirmance of the District Court's decision, in an opinion dated June 27, 1987.

In the civil action filed in Delaware County, a motion for summary judgment filed by the insurers was granted by Judge Labrum (a defendant herein) on October 4, 1990. The Albericis filed an appeal to the Pennsylvania Superior Court. Oral argument on the appeal was held in mid-July of 1991, approximately two weeks before this action was commenced in the District Court. The Superior Court affirmed the grant of summary judgment against Mr. Alberici, but reversed as to Mrs. Alberici, holding that she was an innocent co-insured whose right of recovery could not be impaired by her husband's fraudulent conduct. Mr. Alberici petitioned the Pennsylvania Supreme Court for permission to appeal from the Superior Court's disposition of his appeal. That permission was not

granted. Accordingly, Mr. Alberici filed his Petition for Writ of Certiorari with this Court on or about December 30, 1992. Writ of Certiorari was denied by this Court on April 5, 1993 (92-1369).

Mr. Alberici also commenced an action against his criminal defense attorneys, Nino Tinari, Esq., and Timothy Gorbey, Esq., in the Court of Common Pleas of Philadelphia County. (Mr. Tinari is named as a defendant in the pending action, though Mr. Gorbey is not.) That action, alleging legal malpractice, was docketed at December term, 1984, Number 588. Summary judgment was granted in favor of the defendant attorneys on July 15, 1987. The Pennsylvania Superior Court affirmed the grant of summary judgment on May 6, 1988. 542 A.2d 127 (1988).

IX. SUMMARY OF ARGUMENT

In this action, plaintiffs allege that there was a conspiracy against them on behalf of the United States Attorney's Office and others to obtain Mr. Alberici's criminal conviction. They also appear to assert that there was a second conspiracy by the insurance companies and their counsel in defending the civil action. The Respondents filing this brief, for the reasons that will be discussed more fully below, believe that all claims against them are totally unjustified on a factual basis. However, they also submit that there is no need for this Court to address, at any length, the underlying factual averments because the plaintiffs are clearly not entitled to a recovery under any of the theories set forth in the complaint. Moreover, since no novel, unique, or substantial issue is implicated by this case, there would be no reason for the court to

exercise its discretionary authority and grant the requested Writ.

Plaintiffs' claims relating to the alleged conspiracy to obtain the criminal conviction are barred by the various statutes of limitation. Plaintiffs' claims under the civil rights, and RICO statutes should also have been dismissed for the reason that plaintiffs have no cognizable claim under those statutes.[2] Finally, plaintiffs' state tort law claims, relating to the alleged conspiracy to defend the civil action, are barred by the doctrine of absolute judicial privilege.

X. ARGUMENT

A. Statute of Limitations

Count I of the complaint asserts a claim of violation of the civil enforcement provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1964. The statute of limitations for a civil RICO claim is four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). Since the complaint was filed on July 31, 1991, the court must determine whether the Albericis' RICO claims accrued on or after July 31, 1987.

Count II of the complaint asserts a claim of deprivation of civil rights, presumably under color of state law,

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[2] Plaintiffs have, apparently, waived any claims they might have had under the Anti-Trust statutes. See, Brief of Appellants in the Court of Appeals, p. 4 ("Appellants are not appealing dismissal of the Antitrust claim").

in violation of 42 U.S.C. §1983. The statute of limitations for the civil rights claims would be the two year limitations period for personal injury actions found in the Pennsylvania Judicial Code, 42 Pa. C.S. §5524; *Wilson v. Garcia*, 471 U.S. 261 (1985). Thus the operative date for accrual of the civil rights action would be July 31, 1989.

Count III of the Complaint alleges a violation of the anti-trust statutes. As noted (*ante*, p. 9, n. 2). That claim has been waived.

Count IV of the complaint asserts claims under common law theories of libel, slander, and intentional infliction of emotional distress. The statute of limitations for the claims of libel and slander would be 1 year. 42 Pa. C.S. §5523, and for intentional infliction of emotional distress, it is 2 years, 42 Pa. C.S. §5524. The operative dates for accrual of these claims would therefore be July 31, 1990, for the defamation claims, and July 31, 1989, for the intentional infliction claim.

The last event alleged in the Complaint that would appear to have anything to do with the alleged conspiracy to have Mr. Alberici convicted of mail fraud was the Third Circuit's affirmance of the District Court's order denying the §2255 motion. The decision was rendered on or about June 25, 1987. (Complaint paragraph 58(s)). All the alleged impropriety with presenting evidence and witnesses at trial obviously occurred prior to or during the trial, which was held in January of 1983. It is also apparent from the record of the criminal case that Mr. Alberici was aware, in his own mind, of all the improprieties he now complains of by the time he filed his Motion for a New Trial on the grounds of newly discovered

evidence on or about January 8, 1985. (Complaint paragraph 58(p); see also, *U.S. v. Alberici*, 618 F. Supp. 660 (1985)). At the very latest, however, Mr. Alberici was award of the basis for his present claims when he filed his petition pursuant to 28 U.S.C. §2255, in February of 1986. In sum, all the claims pertaining to an alleged conspiracy to have Mr. Alberici prosecuted and convicted of the criminal charges are clearly barred by the various statutes of limitation.

The District Court agreed with this reasoning when it dismissed the complaint. On appeal, the Albericis contended that their cause of action accrued, for purposes of the statute of limitations, on the date that the Third Circuit denied rehearing on Mr. Alberici's appeal from the denial of his §2255 petition. This contention ignores clear precedent holding that a civil RICO claim accrues on the date that the plaintiff knew, or should have known that the elements of a civil RICO cause of action existed. *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

In this case, it is apparent that Mr. Alberici was aware of the basis for his present claims of conspiracy at least when he filed his petition under 28 U.S.C. §2255. In disposing of that petition, Judge Pollack referred to Mr. Alberici's claim that there was a connection between the prosecution of the criminal case and the defense of the action against the insurers. As is acknowledged by the Albericis in their brief to the Third Circuit in this action, it is precisely this connection which is at the heart of the current claims of RICO violation. See, Brief of the Appellants in the Third Circuit, p.13 ("the civil suit and the criminal prosecution are both separate elements of a

broader single conspiracy . . . to obtain the conviction for Mail Fraud [and] . . . preclude the said appellant from collecting the insurance proceeds." Since Mr. Alberici was alleging precisely the same conspiratorial relationship as he is presently alleging, as early as February of 1986, it is abundantly clear that he was aware of the basis for his present claims at least as of that time.

In light of Mr. Alberici's demonstrated awareness, it is apparent that all claims asserted by plaintiffs are barred. If the two year statute of limitations for civil rights violations and pendent state tort claims is applied, then plaintiffs' claims were barred on and after February of 1989. If the four year statute of limitations for civil RICO violations is applied, then plaintiffs' claims were barred on or after February of 1990. Since this action was not commenced until July 31, 1991, all of plaintiff's claims are barred.

The Albericis contend that the statute of limitations should be tolled, under the RICO statute, for the reason that they continue to suffer injury, and for the reason that the defendants allegedly continue to perpetrate RICO predicate acts. They cite *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), in support of this proposition. This argument ignores the fact that Mr. Alberici had actual awareness of the facts he contends support his RICO claim well before July 31, 1987. Since any theory of equitable tolling of the limitations period is an exception, which extends the limitations period in situations where actual awareness is not present, it is submitted that an extension of the limitations period in this case is simply unwarranted.

Even if this court were to apply the *Keystone* rationale to the facts of this case, it is apparent that the Albericis have suffered no RICO injury within the four years preceding the institution of suit, nor have any of the defendants committed any predicate acts. Plaintiffs contend that they continue to suffer injury because the insurers, through their attorneys, continue to defend against the suit for the insurance proceeds. From a practical standpoint, this assertion is untenable. If the Albericis' contention were to be accepted by this court, then any litigant, by bringing an action and filing appeals from adverse determinations, would be accorded an unfettered opportunity to extend his limitations period merely by citing the expedient excuse that litigation continues.

The Albericis' contention that they continue to suffer a RICO injury is incorrect on purely legal grounds, as well. In essence, the claim is that the insurers' refusal to admit liability in the state court litigation constitutes a continuing injury which tolls the limitations period. It has been held, however, that as a matter of law an adversary's refusal to admit that a claim is valid will not extend the time limit for filing suit. *Anderson v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1126 (W.D. Pa. 1990); *Firestone & Parson Inc. v. Union League of Philadelphia*, 672 F. Supp. 819 (E.D. Pa. 1987), *affirmed without opinion*, 833 F.2d 304 (3d Cir. 1987).

The claim that the limitations period should be extended because the defendants, allegedly, continue to commit predicate acts is equally unsupportable. As the District Court correctly observed in its opinion, the complaint is virtually devoid of any allegations which would

support a finding that any predicate acts have been committed. Nonetheless, on appeal, the Albericis contended that the insurers' continued defense of the civil action constitutes obstruction of justice, which is claimed to qualify as a predicate act.

Section 1961 of the RICO Act does indeed include a violation of "section 1503 (relating to obstruction of justice)" as one of the possible predicate acts upon which a pattern of racketeering could be based. However, when examined, it becomes apparent that 18 U.S.C. §1503 has absolutely no application to this case whatsoever. That statute makes it a crime to "corruptly, or by threats of force, or by threatening letter of communication" attempt to influence, intimidate or impede a variety of judicial and prosecutorial officers.

Nowhere in the complaint, nor in the Albericis' appellate brief, is it alleged that any of the defendants attempted to influence any judicial or prosecutorial officer at any time after July 31, 1987. As such, the Albericis' claims of continuing predicate acts must be rejected. The Albericis' claims are therefore barred, in their entirety, and the District Court's dismissal of the complaint was properly affirmed. There is no sound reason calling for this Court to review those decisions.

B. Absolute Privilege/State Tort Claims

As noted above, Mr. and Mrs. Alberici filed a civil action in the Court of Common Pleas of Delaware County seeking recovery of insurance proceeds that they claim covered the movie theatre. It should come as no surprise

that the insurance companies denied coverage because of the nature of the fire and the ultimate indictment and conviction of Mr. Alberici.

The defense of defendant, Safeguard, was initially undertaken by defendant, Barry Goldstein, Esquire. The defense of the other insurance companies was initially undertaken by the firm of Cozen & O'Connor (a defendant herein), which subsequently entered an appearance for Safeguard as well. In the early 1980's, Safeguard became insolvent, and Safeguard's obligations, subject to statutory provisions, were taken over by the Pennsylvania Insurance Guaranty Association (PIGA). PIGA retained the undersigned firm, defendant, Duane, Morris & Heckscher, to represent its interests. Shortly thereafter, a conflict developed in the Cozen firm, and Duane, Morris took over the defense of all the insurance companies in the Delaware County action.[3]

The acts of alleged impropriety concerning the Alberici's civil case are outlined in paragraphs 76 through 83, and 86 of the complaint. These paragraphs concern statements made by counsel for the insurance companies in pleadings, motions, or briefs, as well as matters allegedly not included with such items. The insurance companies and their defense counsel are absolutely privileged from liability for the matters complained of in these paragraphs of plaintiffs' complaint.

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[3] Defendants Emory and O'Hayer are attorneys affiliated with Duane, Morris & Heckscher and are primarily responsible for defending the insurers in the Albericis' state court suit to recover the insurance proceeds.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the District Court was required to apply Pennsylvania law to plaintiff's tort claims. Pennsylvania law is now well established that all communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege that cannot be destroyed by abuse. *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56 (1971); *Accord: Greenberg v. Aetna Insurance Co.*, 427 Pa. 511, 514, 235 A.2d 576, 577 (1967); *Barto v. Felix*, 250 Pa. 252, 266, 378 A.2d 927, 929 (1979). This privilege exists in favor of counsel so that counsel will be permitted to represent the clients' interests to the fullest extent. *Binder v. Triangle Publications.* All persons involved in judicial proceedings are encouraged by the privilege to speak frankly and argue freely without concern that they may be required to defend their statements in a later defamation action. Although it is possible that "wrong may at times be done to a defamed party, it is *damnum absque injuria*. The inconvenience to the individual must yield to a rule for the good of the general public." *Yearsley v. Franklin Lamp Manufacturing Co.*, 97 Pa. Super. 538, 540 (1929) (quoting, *Kemper v. Fort*, 219 Pa. 85, 94, 67 A. 991, 995 (1907)).

Whether the privilege exists is a question of law for the court. *Montgomery v. Dennison*, 336 Pa. 255, 265, 69 A.2d 520, 525 (1949); *Rankin v. Beleef*, 206 Pa. 27, 31, 211 A.2d 56, 58 (1965); *Medico v. Time, Inc.*, 409 F. Supp. 268, 272 (E.D. Pa. 1980), *aff'd*, 643 F.2d 134, *cert. denied*, 454 U.S. 36, 102 S.Ct. 139, 70 L.Ed.2d 116 (1981).

The privilege extends beyond statements made in documents filed with the court. In fact it extends to all

communications relating or ancillary to the prosecution and defense of legal actions.

> The purpose for which the privilege exists cannot fully be achieved by limiting the privilege to structured or formal proceedings. To permit an attorney to best serve his client, the privilege must be broad enough to include occasions when a client's cause is advocated under less formal circumstances. Thus the privilege extends to and includes preliminary demands, as well as informal conferences and negotiations, conducted after litigation has been commenced or when litigation is seriously contemplated. 'It is, on the whole, for the public's interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions.'

Smith v. Griffiths, 327 Pa. Super. 418, 476 A.2d 22 (1984) (*quoting, Sriberg v. Raymond*, 370 Mass. 105, 345 N.E.2d 882, 884 (1976)).

In *Smith v. Griffiths*, plaintiff Smith was an attorney involved in divorce proceedings with his wife. He filed a civil action against Rees Griffiths, the lawyer representing Smith's wife in the marital action. Smith contended that Griffiths had defamed Smith on two occasions, the first being a series of letters written by Griffiths to the court appointed master hearing Mrs. Smith's petitions for alimony, alimony *pendente lite*, counsel fees and costs. Griffiths stated, in these letters, that Smith had not paid counsel fees and expenses as previously agreed, had

leased the marital domicile and appropriated the rent received to his own use; and had failed to pay real estate taxes on the marital property, as a result of which the property was to be listed for a tax sale.

The second alleged instance of defamation occurred when Griffiths allegedly slandered Smith by stating that Mrs. Smith was distraught because Mr. Smith had failed to pay support orders previously entered. These statements were allegedly made in the chambers of the judge issuing the support order, during an unrelated pretrial conference attended by both Smith and Griffiths.

The trial court sustained preliminary objections in the nature of a demurrer to the complaint on the ground that the communications were privileged, and therefore not actionable. The Pennsylvania Superior Court affirmed on appeal. In reaching this decision, the Superior Court noted the long standing rule that counsel is to be accorded an absolute judicial privilege for oral statements made in connection with the prosecution or defense of legal actions. As was noted by the Superior Court, the salutary purpose of this rule is to insure that counsel are encouraged to speak frankly and argue freely without danger or concern of being required to defend statements in a later defamation, or other, action.

Since the statements made by the defendant in *Smith* were not included in formal filings with the court, but instead were informal communications related to a pending legal action, the issue to be decided by the Superior Court was whether or not the privilege was to be extended to such informal communications. The Superior Court determined that only by extending the privilege to

informal communications related to judicial proceedings could the interests for which the rule was created (i.e., encouraging full, frank, and uninhibited advocacy) be protected. Since the Court determined that the privilege would be extended to all related communications, 476 A.2d 22, at 25, it affirmed the lower court's grant of demurrer in favor of defendant Griffiths.

Since the great majority of the acts complained of in the complaint relate to statements made by counsel for the insurers in documents filed with the court in the defense of the Alberici's claim for insurance proceeds, it is apparent that defendants are entitled to an absolute privilege for those statements.

There are also general allegations of unspecified, improper conduct between counsel and the Delaware County Court, but nothing independent of the judicial process whereby the insurance companies moved for and obtained Summary Judgment. Accordingly, the conduct complained of by way of these general allegations is also privileged.

The only other specific allegation of impropriety pertaining to the defense of the insurance companies is a reference to a letter of October 19, 1990. Because plaintiffs did not include this letter with the Complaint, the insurers and their attorneys attached a copy of it as Exhibit "A" to their Answer to the Complaint. As can be seen by the letter, it was addressed to plaintiff's counsel in the Delaware County action and was written shortly after the Court's Order entering Summary Judgment in favor of the insurers.

Prior to that time, the insurers had made an offer of $72,500.00 to settle Mrs. Albericis's claim. That offer was initially made by correspondence dated October 12, 1987 and had been kept open until the October 19, 1990, correspondence to the Albericis' counsel, which simply advised that the previous offer of settlement had been withdrawn. The October 12, 1987 correspondence is Exhibit "B" to defendants' Answer.

Respondents submit that, on its face, this correspondence clearly does not justify the characterization of "extortion," as is alleged by plaintiffs. (Complaint, paragraph 86 A). Furthermore, they submit that in view of its nature, the stage of the civil action at that time, and the fact that it was addressed to the Albericis' counsel, the defense of privilege applies to any claims that might arguably be based on the sending of the letter. In light of the clear holding in *Smith v. Griffiths* that the judicial privilege extends to communications which are ancillary to a pending legal action, there can be no doubt that defendants are privileged from liability for the actions complained of in the plaintiffs' complaint.

Both the District Court and the Court of Appeals agreed with the foregoing analysis of this narrow issue of Pennsylvania tort law. Their treatment of this limited question need not be reviewed by this Court.

C. Failure to State a Claim/RICO

Petitioners attempt to state a cause of action for violation of the RICO statute, 18 U.S.C. §1964. The complaint fails to state a cause of action in this regard, however, due to the failure to plead the existence of a

racketeering "enterprise" separate from the alleged "pattern of racketeering activity."

As was noted by this Court in *U.S. v. Turkette*, 452 U.S. 576 (1981), in order to secure a conviction under RICO, the government must prove both the existence of an "enterprise" and a connected "pattern of racketeering activity." As the court went on to state:

> The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise . . . The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

Id. at 583 (footnote omitted).

In this case, the plaintiffs' complaint alleges only the various acts carried out by some of the defendants. Plaintiffs do not (and probably can not) allege that the 42 defendants named somehow collaborated in a separate "enterprise" which carried out the "pattern of racketeering" of which they complain. The absence of such an allegation is fatal. *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786 (3d Cir. 1984). Because of the failure to allege a separate "enterprise," plaintiffs' allegations of racketeering violations are fatally defective, requiring that the allegations be dismissed for failure to state a claim, as a matter of law.

D. Failure to State a Claim/Civil Rights Act

The Complaint fails to state a cause of action, and accordingly was properly dismissed, due to the fact that it fails to allege any facts which would support a conclusion that the insurers and their attorneys deprived plaintiffs of a constitutional or statutory right under color of state law. The failure to indicate that Petitioners have been deprived of a statutory or constitutional right by defendants, as state actors, is fatal to their claim. *Howard v. Pine Forge Academy,* 678 F. Supp. 1120 (E.D. Pa. 1987).

Petitioners cannot successfully argue that these private parties, insurers and their attorneys, acted in concert with state officials. They have pled only vague and conclusory allegations asserting that there was an "agreement and conspiracy" to convict Mr. Alberici in Federal Court and a conspiracy with other defendants to have the state court action for insurance proceeds dismissed. Plaintiffs do not, and cannot, allege that the defendants, private litigants and their counsel, were state actors. The mere fact that defendants were litigants, standing alone, is insufficient to constitute an allegation of "action under color of state law". The truth of this proposition is established by consideration of its alternative. If the activities of a private litigant and its counsel were, *per se,* considered to be state action, then disappointed litigants would be free to assert claims of §1983 deprivation of civil rights whenever a judge is persuaded by the prevailing party to render a decision adverse to the losing party. This, obviously, is not the case. *See, Celano v. Celano,* 537 F. Supp. 690 (E.D. Pa. 1988).

Petitioners have failed to allege and establish any facts to support the conclusion that these Respondents agreed or conspired with state officials to wrongfully convict plaintiff Alberici, and have similarly failed to establish that these Respondents acted under color of state law in defending the claims stated by Mr. and Mrs. Alberici in their civil action for recovery of insurance proceeds. As such, Count II of plaintiffs' Complaint failed to state a cause of action. Its dismissal by the District Court was proper. The affirmance by the Third Circuit was correct. There is no substantial issue requiring review by this Court.

XI. CONCLUSION

The District Court properly dismissed the Albericis' Complaint, and the Third Circuit properly affirmed. The actions complained of in the Complaint, even if they are assumed to be actionable (a point which the insurers and their attorneys do not concede) are clearly barred by all the applicable statutes of limitations.

The claims of common law tort violations were also properly dismissed, as to the insurers and their attorneys, as the defendants are clearly accorded an absolute judicial privilege. The District Court was properly affirmed in this regard.

Finally, since the Complaint fails to set forth cognizable causes of action for violation of the RICO and civil rights statutes, those counts of the Complaint were properly dismissed. Affirmance in this regard was proper as well.

There is no substantial issue in this case requiring review by this Court. In fact, the Court of Appeals correctly observed that this case was "frivolous". The Petition for Writ of Certiorari should be denied.

DUANE, MORRIS & HECKSCHER

BY: EDWARD GRIFFITH
EDWARD GRIFFITH
Attorneys for Defendants, Safeguard Mutual Insurance Co., PA Insurance Guaranty Assn., General Accident Fire and Life Ins. Corp., Quaker State Mutual Group, Michael O'Hayer, Hugh M. Emory, and Duane, Morris & Heckscher

APPENDIX

Exhibit A*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ALBERICI and THERESA ALBERICI, Husband and Wife, et al.,	:	Civil Action
Plaintiffs,	:	No. 91-4870
vs.	:	
UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE, et al.	:	
Defendants	:	

MEMORANDUM AND ORDER[1]

(Filed Mar 16, 1992)

VAN ANTWERPEN, J. MARCH 13, 1992

This action, filed against forty-three defendants, including the United States Justice and Treasury

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*Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

[1] Defendants Cozen & O'Connor, Stephen A. Cozen, Bertram Horowitz, J.B. Haas, and Young Adjustment Company moved to dismiss the claims against them on the grounds that plaintiffs failed to state a claim upon which relief could be granted, and that any cause of action alleged in the complaint was barred by the applicable staute of limitations. Finding the claims against these defendants to be so meritless and untimely as to be almost frivolous, we dismissed the above-named defendants without a written opinion on September 25, 1991. This memorandum supplements those dismissal orders as well as the order attached hereto.

Departments, various federal and state officials and judges, attorneys, insurance companies, and other individuals and businesses, represents the latest development in Joseph Alberici's continuing efforts concerning a crime he was convicted of in 1983. The Complaint alleges a vast conspiracy among all the named defendants, with the object of securing the ruin of Plaintiffs' businesses and reputations, and the conviction of federal mail fraud and incarceration of Plaintiff Joseph Alberici. Plaintiffs attempt to state claims under 18 U.S.C. § 1962[2], the Racketeer Influenced and Corrupt Organizations Act ("RICO"); 42 U.S.C. § 1983, for civil rights violations; 15 U.S.C. § 1, for a conspiracy in restraint of trade (the "antitrust claims"); and under the common law of Pennsylvania, for the torts of libel, slander, and intentional infliction of emotional distress. Jurisdiction in this Court is based on 28 U.S.C. § 1331, 18 U.S.C. § 1964, and 15 U.S.C. §§ 15 and 25.

Each of the defendants in this action has filed a motion to dismiss, for judgment on the pleadings, or for summary judgment, and Plaintiffs have filed briefs in response.[3] We now dispose of all of those motions.

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[2] Plaintiffs do not specify in their complaint under which subsection of § 1962 they are suing. Since subsections (c) and (d) seem to be the only possibly applicable portions of the act, we will assume that plaintiffs intend to claim under those subsections.

[3] We note that, although Plaintiffs initially filed the Complaint in this action *pro se*, on behalf of himself and others, all plaintiffs are now represented by an attorney. Plaintiffs' attorney has not seen fit to amend or supplement either the Complaint or any other papers filed without counsel in this matter.

BACKGROUND

The Complaint in this case alleges that Joseph Alberici was indicted and convicted of mail fraud in the United States District Court for the Eastern District of Pennsylvania in 1983. The mail fraud conviction was based on evidence that Alberici planned the arson of the Jerry Lewis Theater in Aston, Pennsylvania and hired people to set the fire in order to collect the insurance.[4] Although a jury found Alberici guilty on six counts of mail fraud, the Court vacated all but one count. On September 9, 1983, Alberici was sentenced to a term of imprisonment of twenty months. After several fruitless appeals, including a Petition for Writ of Certiorari to the Supreme Court of the United States, on January 8, 1985 Alberici filed a motion for a new trial on the grounds of newly discovered evidence. After granting him ten hearings between January 21 and February 21, 1985, in which to produce this claimed new evidence, the District Court denied the motion on August 9, 1985. Alberici's last appeal was disposed of when, on June 27, 1987 the Third Circuit Court of Appeals upheld the conviction. Complaint ¶ 58.

The Complaint also refers to a lawsuit filed by Joseph Alberici in the Pennsylvania Court of Common Pleas for Delaware County, Civil Action #78-10515, in which Alberici sought to recover the insurance proceeds for the building he burned down from five of the defendants in

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[4] Alberici, through his nominee, La Casa Mia, Inc., had contracted to purchase the building shortly before the fire, and had insured the building for $525,000. Complaint ¶ 58(H).

this action, Safeguard Mutual Insurance Company, General Accident Fire and Life Insurance Co., Ltd., Insurance Placement Facility, Quaker State Mutual Group, and Home Mutual Insurance Company of Pennsylvania (the "insurance company defendants"). It appears from the Complaint that that lawsuit was not finally resolved until October 4, 1990, when Defendant Judge Joseph LaBrum entered summary judgment for the defendant-insurers.

The forty-four page Complaint details Alberici's objections to various pieces of evidence at the criminal and civil trials, and his disagreements with the judges' rulings and his opponents' arguments. He claims that the parties and judges violated several procedural rules, and that several witnesses at the trials lied. The prosecutors called surprise witnesses and deceived the court into believing that Alberici was guilty. They held secret "ex parte" meetings with the investigating agents and the aggrieved insurance companies who were the victims of the mail fraud.

Alberici also objects to the investigative methods of the B.A.T.F. agents. Alberici complains that the federal authorities have no business investigating an arson case because arson is a state crime (Complaint at ¶ 62) and that they had the outrageous gall to subpoena Alberici and other witnesses and interrogate them in front of a grand jury. Not only did the defendant-agents subpoena Alberici's business records, but they persuaded other people to cooperate in the investigation "without authority or justification." *Id.* The Complaint also states that Defendants Barry Lory, Dennis Dutch, Stephen Wehner and Joanne Epps removed certain exculpatory documents from his case file, altered or destroyed other documents,

and that the prosecutors fabricated "all the mail fraud documents of evidence used against Defendant Joseph Alberici." Complaint at ¶ 67.

The allegations regarding the civil case are limited to false statements in pleadings and motions, violation of the Pennsylvania Rules of Civil Procedure, and erroneous rulings by the judges involved.

STANDARD OF REVIEW

A. Motions to Dismiss and for Judgment on the Pleadings

The familiar Rule 12(b)(6) criteria apply to the disposition of the motions to dismiss.[5] In reviewing the sections of the complaint attempting to state claims against these defendants, we accept as true all factual allegations and all reasonable inferences that can be drawn therefrom, *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991), and we view them in the light most favorable to Plaintiffs, the non-moving parties, *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). We may dismiss the claims against these defendants only if it is clear that no relief could be

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[5] The pleadings are closed and factual matters outside the pleadings have not been submitted. Therefore, the standard of a Fed. R. Civ. P. 12(b)(6) motion to dismiss will be applied to the Motion for Judgment on the pleadings under Fed. R. Civ. P. 12(c) filed by the insurance company defendants (Docket item #24). *Republic Steel Corp. v. Pennsylvania Engineering Corp.*, 785 F.2d 174, 182 (7th Cir. 1986); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979); *Harris v. WGN Continental Broadcasting Co.*, 650 F.Supp. 568 (N.D. Ill. 1986).

granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

B. Motion for Summary Judgment

The federal government parties[6] have filed a Motion for Summary Judgment rather than a 12(b)(6) motion. The Rule 56 standard applies. The court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). And issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law.[7] *Id.* at 248, 106 S.Ct. at 2510. All inferences must be drawn and all doubts resolved in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962); *Gans v.*

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[6] United States Government, Department of Justice, former Assistant United States Attorneys Peter F. Vaira, David R. Strawbridge, Luther E. Weaver, Stephen V. Wehner, and Joanne A. Epps, the Department of the Treasury, and Special Agents Barry F. Lory and Dennis E. Dutch of the B.A.T.F.

[7] Pennsylvania law provides the rules of decision in this case under *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Mundy, 762 F.2d 338, 341 (3d Cir. 1985) *cert. denied* 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985).

On motions for summary judgment, the moving parties bear the initial burden of identifying for the court those portions of the record that it believes demonstrate the absence of material fact disputes. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To defeat summary judgment, the non-moving parties – Plaintiffs, in this case – must respond with facts of record that contradict the facts identified by the movant, and may not rest on mere denials. *Id.* at 321 n.3, 106 S.Ct. at 2552 n.3 (quoting Fed. R. Civ. P. 56(e)); *see First National Bank of Pennsylvania v. Lincoln National Life Insurance Co.*, 824 F.2d 277, 282 (3d Cir. 1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. *See Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510-11.

Since there is no evidence whatsoever in the record in this case – no affidavits, no depositions, no interrogatory answers – we will assume that Defendants admit as true for the purpose of this motion all well-pleaded facts in the Complaint, and treat this motion essentially the same as a motion to dismiss. The Defendants are entitled to judgment if it is clear from the facts in the Complaint that Defendants are entitled to relief as a matter of law.

DISCUSSION

A. RICO claims

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1987), the Supreme Court decided that the limitations period for actions

brought under the civil enforcment provision of the Racketeer Influenced and Corrupt Organizations Act is the four year period for Clayton Act actions. *Agency Holding* did not reach the issue of when this limitations period starts, but the Third Circuit Court of Appeals has held that it

> runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.

Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988).

It is obvious from the face of the complaint that Plaintiffs' RICO claims are barred because they were not brought within four years of the date on which the limitations period began to run. *See Cleveland v. Berkson*, 878 F.2d 1034, 1036 (7th Cir. 1989) (RICO and civil rights complaint properly dismissed where complaint makes it clear that the acts complained of took place more than four years before complaint filed). The allegations necessary to support a RICO claim by a private plaintiff under 18 U.S.C. § 1962 are (1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity, and (5) injury to the plaintiff's business or property. *Id.* at 1128, citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985). A "pattern" requires at least

two acts, and "racketeering activity" means any one of those predicate offenses listed in 18 U.S.C. § 1961(a)(1).

At best, the Complaint attempts to allege two separate plots against the plaintiffs, one centered around the criminal prosecution and one consisting of the insurance companies' and their attorneys' defense of Alberici's civil suit in state court. There are absolutely no allegations regarding the civil suit conspiracy that even come close to alleging an illegal RICO conspiracy. The allegations of manufacturing and suppression of evidence in the criminal prosecution come closer to a valid RICO claim, but they all occurred in the late 1970's and early 1980's, much more than four years before the filing of the Complaint. While it is difficult to judge when Plaintiffs first discovered that a cause of action existed in a case like this one, where it is patently obvious that Plaintiffs in fact have no cause of action, we can state with certainty that they knew or should have known of all of the facts and speculations alleged in the Complaint at the very latest by the time of Alberici's January 8, 1985 motion for a new trial based on supposedly newly discovered evidence.

Nor do Plaintiffs fit within the exception which extends the starting date for the limitations period when there are further RICO injuries or predicate acts. *See Keystone Ins. Co. v. Houghton, supra.* There has been no RICO injury or predicate act within the last four years in either the criminal prosecution plot or the civil suit defense plot.[8] In fact, the only thing alleged in the complaint to have happened within the last four years took

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[8] We do not mean to imply that the Complaint alleges any RICO predicate acts which occurred more than four years ago.

place in the state court action C.A. #78-10515 when the Defendants answered Alberici's motion for summary judgment and made a cross-motion for summary judgment, and Judge LaBrum granted the defendant's motion. Filing motions and receiving a favorable judicial result are not predicate acts under the RICO statute, nor does Plaintiff's loss of a lawsuit that has been pending for fourteen years, and whose result was necessesarily determined by the Plaintiff's 1983 criminal conviction, constitute further RICO injury.

In sum, we find that any RICO claims which Plaintiffs could have proved against these defendants are barred by the four year statute of limitations. By resting our decision on the statute of limitations, we do not intend to discount the numerous other defenses and complaint deficiencies raised in Defendants' motions. In the interest of conserving judicial resources, we will not discuss these other defenses at length, but will merely note that the Complaint fails to allege a RICO enterprise or enterprises, fails to allege any predicate acts sufficient to constitute a pattern of racketeering activity, and fails to overcome the judicial and prosecutorial immunities of many of the defendants and the res judicata effect of the judgments against Joseph Alberici in both the District Court and the Pennsylvania Court of Common Pleas.

We have not been able to detect a single allegation of a RICO predicate offense, let alone the two offenses required to form a pattern, in the entire Complaint.

B. § 1983 Claims

Claims under 42 U.S.C. § 1983 are subject to the state statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 280 105 S.Ct. 1938, 1949 (1985). Since all complained-of acts took place in Pennsylvania, it is appropriate here to apply Pennsylvania's two year statute of limitations for personal injury actions, found at 42 Pa.Cons.Stat.Ann. § 5524 (Purdon's 1991 Supp.). *Bougher v. University of Pittsburgh*, 882 F.2d 74, 78 (3d Cir. 1989); *see also Fitzgerald v. Larson*, 769 F.2d 160, 162 (3d Cir. 1985). Accordingly, plaintiffs' claims are time-barred if the claims accrued before July 31, 1989.

Unlike under the RICO action accrual rule in *Keystone Insurance*, supra, in a § 1983 action the date of accrual is the date on which plaintiffs knew or had reason to know of the injury that constitutes the basis of this action. *Deary v. Three Unnamed Police Officers*, 746 F.2d 185, 197 (3d Cir. 1984). Here, from the face of the complaint we can ascertain that Plaintiffs must have known of the injuries relating to the criminal prosecution of which they complain by the date of Joseph Alberici's criminal conviction in 1983. *See Syre v. Commonwealth of Pennsylvania*, 662 F.Supp. 550, 553-54 (E.D. Pa. 1987), aff'd 845 F.2d 1015 (3d Cir. 1988), *cert. denied* 488 U.S. 853, 109 S.Ct. 139 (1988) (plaintiff's § 1983 and RICO claims against numerous defendants for allegedly conspiring to prosecute him accrued on the date of his criminal conviction). The § 1983 claims based on the criminal prosecution, and the claims for actions by the civil suit defendants which took place before July 31,

1989, are thus barred by the statute of limitations unless there is some basis for tolling the limitations period.[9]

Plaintiff Alberici argues that the limitations period must be tolled under the doctrine of fraudulent concealment. Federal law permits tolling the § 1983 statute of limitations where plaintiffs allege facts showing that "defendants concealed the conduct complained of, and that plaintiffs failed, despite the exercise of due diligence on its part, to discover the facts forming the basis of [their] claim." *Commonwealth of Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F.Supp. 885, 887 (M.D. Pa. 1985).

In order to take advantage of this tolling principle, plaintiffs must allege (1) defendants' wrongful concealment of their actions, (2) failure of the plaintiffs to discover the operative facts or the basis of their causes of action within the limitations periods; and (3) plaintiff's due diligence until discovery of the facts. *Bethlehem Steel Corp. v. Fischbach and Moore, Inc.*, 641 F.Supp. 271, 273 (E.D. Pa. 1986). Wrongful concealment consists of specific affirmative conduct of defendants which would, under the circumstances of this case, lead a reasonable person to believe that he or she did not have a claim for relief. Silence or passive conduct of defendants is not deemed fraudulent absent some special relationship between the parties which imposes a duty of disclosure upon the defendants. *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F.Supp. at 888, citing *Rutledge v. Boston Woven Hose*

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[9] We discuss the allegations regarding more recent events in the civil suit below.

and Rubber Co., 576 F.2d 248 (9th Cir. 1978). In addition, the Federal Rules of Civil Procedure require that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Fed.R.Civ.P. 9.

Nowhere in the Complaint do Plaintiffs claim that the conduct complained of was concealed from them, or that they only found out about it recently. Moreover, even if we assumed that Plaintiffs just discovered the operative facts the day before they filed it, there is no attempt to allege due diligence in attempting to uncover there claims in the years since the conduct took place. Plaintiffs here have failed to allege facts supporting a fraudulent concealment theory, and so their claims are barred by the statute of limitations.

The Complaint does allege that several events took place within the two years before this action was initiated. In 1990 the insurance company defendants and their attorneys filed an answer to Joseph Alberici's Motion for Summary Judgment in Civil Action 78-10515, and in 1991 they filed a brief with the appellate court in that action. Judge Joseph LaBrum entered an order in October, 1990 disposing of that lawsuit, and supplemented that order with an opinion in February, 1991. By no stretch of the imagination could these acts give rise to a cause of action under § 1983.

In order to state a claim against a private party, such as the insurance companies and their attorneys in this case, under § 1983, a plaintiff must allege that the private party willfully participated in a joint action with a state official. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90

S.Ct. 1598, 1605 (1970). This participation can be found in a conspiracy or agreement between a judge and a private citizen to deprive someone of a federal right, but it must go beyond a judge simply "agreeing" with one party and disagreeing with another in rendering his decision in a case. *Celano v. Celano,* 537 F.Supp. 690, 694-95 (E.D. Pa. 1982), citing *Sparkman v. McFarlin,* 601 F.2d 261, 262 (7th Cir. 1979) (Fairchild, J., concurring). "Otherwise, counsel could state a cause of action under section 1983 whenever a judge was persuaded by the prevailing party to render a decision adverse to the losing party." *Celano v. Celano,* 537 F.Supp. at 695. There is no allegation in this case that the winning parties in civil action 78-10515 bribed Judge LaBrum, or otherwise compromised the judge's independence and usurped his official power. *See Id.; see also Dennis v. Sparks,* 449 U.S. 24, 28, 101 S.Ct. 183 at 186 (1980) (private parties who bribe judge acting under color of state law).

"[J]udges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities." *Dennis v. Sparks,* 449 U.S. at 27, 101 S.Ct. at 186 (citations omitted). The complaint in this action fails to state a claim against Judge LaBrum, or, in fact, against any of the judge-defendants, because all of the alleged acts of those defendants were performed in their judicial capacities.

Just as we noted in discussing the RICO count, we acknowledge here that Defendants have stated numerous valid defenses and objections to the complaint besides the statute of limitations ground. The Complaint does not sufficiently allege that the non-state actors acted under color of state law. It does not overcome the traditional

privilege granted to pleadings in judicial proceedings, it relies on facts which have already been decided against Plaintiffs in other judicial decisions which must be given preclusive effect, nor does it overcome judicial and prosecutorial immunities of many of the defendants. It is sufficient, however, to dismiss the Complaint for untimeliness without discussing these defenses in detail.

C. Antitrust Claims

Plaintiffs' Count III attempts to state a general claim under "the Anti-Trust Laws of the United States, including, but not limited to, 15 U.S.C. § 1." 15 U.S.C. § 15b sets out a four year statute of limitations for such antitrust claims.[10] "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 338, 91 S.Ct. 795, 806 (1971). In the case at bar, the only conceivable business injury of which plaintiffs may be complaining is the 1980 closing of Studio 19 and La Casa Mia, Inc. The complaint alleges no such injury in the last four years, and thus the limitations period began to run more than four years ago.

In an attempt to evade the statute of limitations, plaintiff Alberici repeats his argument that the doctrine of equitable tolling for fraudulent concealment applies to his antitrust claims. As we noted above, Plaintiffs have

---

[10] "Any action to enfoce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

not alleged any facts which could support such a claim, and so Count III must fail.

D. State Law Claims for Libel, Slander and Intentional Infliction of Emotional Distress

Libel and slander are subject to a one year statute of limitations in Pennsylvania. 42 Pa. Con. Stat. Ann. § 5523 (1). Other intentional torts, such as intentional infliction of emotional distress, are subject to a two year statute of limitations. 42 Pa. Con. Stat. Ann. § 5524(7). There is no claim that Defendants concealed the allegedly slanderous statements in this case, or that Plaintiffs did not know of them, and so the limitations period will not be tolled. Thus, Plaintiffs' claims for acts occurring before July 31, 1989 are time-barred.

As noted above, the only acts alleged after July 31, 1989, consist of statements made in pleadings and judicial opinions in civil action 78-10515. Pennsylvania accords an absolute privilege to all communications pertinent to any stage of a judicial proceeding. *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56. Thus, it is apparent from the face of the Complaint that Plaintiffs' claims based on those pleadings and opinions must be dismissed.

CONCLUSION

It is apparent from the face of the Complaint that, in spite of a large number of allegations, Plaintiffs have not stated a single claim for relief. Furthermore, given the large number of defendants, the nature of most of the

defendants, and the history of this matter, an element of harassment is present. We would not hesitate to allow Plaintiffs to plead over if we had any reason to believe that a well-founded action could be stated, but that is clearly not the case. Accordingly, we will dismiss the Complaint with prejudice as to those defendants moving to dismiss, and we will do the same for those defendants moving for summary judgment or judgment on the pleadings.[11] An appropriate order follows.

---

[11] Defendant David Soltz has filed a letter which we will treat as a Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ALBERICI and THERESA ALBERICI, Husband and Wife, et al.,	:	Civil Action No. 91-4870
Plaintiffs,	:	
vs.	:	
UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE, et al.	:	
Defendants	:	

ORDER

AND NOW, this 13th day of March, 1992, upon consideration of the Motions for Summary Judgment, Motions for Judgment on the Pleadings, and Motions to Dismiss filed by the Defendants in this case, and having carefully considered Plaintiffs' replies to those motions, it is hereby ORDERED that each of the defendants' motions is GRANTED, and the Complaint is DISMISSED WITH PREJUDICE. Accordingly, Plaintiffs' Motion for Default Judgment against David Soltz, filed January 30, 1992, is DENIED AS MOOT. This case is CLOSED.

BY THE COURT

/s/

Franklin S. Van Antwerpen, J.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1258

JOSEPH ALBERICI; THERESA ALBERICI, Husband and wife; LA CASA MIA, INC., STUDIO 19; VINCENT ALBERICI; ELIZABETH ALBERICI (LA FAUCI); THERESA O'DONNELL

V.

UNITED STATES GOVERNMENT; DEPARTMENT OF JUSTICE; PETER F. VAIRA, ESQUIRE; DAVID R. STRAWBRIDGE, ESQUIRE; LUTHER E. WEAVER, ESQUIRE; STEPHEN V. WEHNER, ESQUIRE; JOANNE A. EPPS, ESQUIRE; DEPARTMENT OF TREASURY; BARRY F. LORY; DENNIS E. DUTCH; COMMONWEALTH OF PENNSYLVANIA; DEPARTMENT OF STATE POLICE; ATTORNEY GENERAL; WILLIAM L. DI GIAMBERDINI; DELAWARE COUNTY, PENNSYLVANIA; GEORGE T. LEWIS; KENNETH J. BOYDEN, ESQUIRE; SAFEGUARD MUTUAL INSURANCE CO.; BARRY J. GOLDSTEIN, ESQUIRE; PA. INSURANCE GUARANTY ASSOC., GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORP., LTD.; INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA; J. KENNETH IVORY; QUAKER STATE MUTUAL GROUP; HOME MUTUAL INSURANCE COMPANY OF PENNSYLVANIA; COZEN & O'CONNOR; STEPHEN COZEN, ESQUIRE; YOUNG ADJUSTMENT CO.; BERTRAM HOROWITZ; ULMER & CO., INC.; THEODORE TEPLICK; JOSEPH T. LA BRUM, JR., JUDGE; RITA E. PRESCOTT, JUDGE; WILLIAM R. TOAL, JR., JUDGE; NINO V. TINARI, ESQUIRE; DAVID A. SOLTZ, ESQUIRE;

DUANE, MORRIS & HECHSCHER; HUGH M. EMORY, ESQUIRE; MICHAEL O'HAYER, ESQUIRE; LEONARD TRIGGIANI, SR.; LEONARD TRIGGIANI, JR.; BOROUGH OF DARBY, PENNSYLVANIA; THOMAS J. POWERS; J.B. (JOYCE BROWN) HAAS

Joseph Alberici,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 91-04870) District Judge: Hon. Franklin S. Van Antwerpen

---

Submitted Under Third Circuit Rule 12(6)
October 1, 1992

Before: SLOVITER, *Chief Judge*,
GREENBERG and GARTH,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

/s/ Delores K. Slouiter
Chief Judge

Attest:
/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: OCT 6 - 1992

Costs taxed in favor of Borough of Darby & Thomas J. Powers as follows:

Brief $214.90

Costs taxed in favor of Toal, Prescott, Labrum & Boyden as follows:

Brief $223.00

Costs taxed in favor of Comm. of Pa. State Police, Atty. Gen, et al. as follows:

Brief $66.60

Costs taxed in favor of Delaware County as follows:

Brief $128.06

Costs taxed in favor of Darby Borough as follows:

Brief $133.35

1515 (4)

No. 92-~~1369~~

Supreme Court, U.S.
FILED
APR 12 1993
OFFICE OF

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH ALBERICI and THERESA ALBERICI, h/w,
Petitioners

v.

UNITED STATES GOVERNMENT, et al.,
Respondents

JOSEPH ALBERICI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DARBY BOROUGH AND THOMAS J. POWERS

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the Court below properly affirmed the dismissal of Petitioners' entire Complaint without granting leave to amend.

II. Whether the Court below properly affirmed the dismissal of Petitioners' RICO claims as barred by the applicable Statute of Limitations.

III. Whether the Court below properly affirmed the dismissal of Petitioners' Civil Rights claims as barred by the applicable Statute of Limitations.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH ALBERICI and THERESA ALBERICI, h/w,
Petitioners

v.

UNITED STATES GOVERNMENT, et al.,
Respondents

JOSEPH ALBERICI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DARBY BOROUGH AND THOMAS J. POWERS

OPINIONS BELOW

The instant Petition for Writ of Certiorari has been taken from the Order of the United States Court of Appeals for the Third Circuit in Case No. 92-CD-1258

dated November 5, 1992, denying the Petition for Rehearing filed by Appellant, Joseph Alberici. The text of this Order is set forth as Appendix B to the Consolidated Petition for Writ of Certiorari.

The Appeal below was taken from the Order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 91-4870, dated March 13, 1992, and amended March 20, 1992, dismissing Plaintiffs' Complaint with prejudice, and dismissing all outstanding Motions. True and correct copies of the Order and Amended Order of the District Court are attached to the Consolidated Petition for Writ of Certiorari as Appendix A.

Any other Order concerned with the instant Petition is from an action to which Respondents were not a party.

COUNTERSTATEMENT OF THE CASE

The Complaint below was brought by Petitioners against forty-three Defendants, including individuals, insurance companies, municipalities and government prosecutors. Among the named Defendants were Respondents, Darby Borough (a municipality) and Thomas J. Powers, an agent of said municipality. This Complaint contains broad, conclusory allegations that the various Respondents (Defendants below) conspired amongst themselves and with others to either fabricate evidence used at the criminal trial of Petitioner, Joseph Alberici, or otherwise attempt to harass and defraud the Petitioners. The various counts in the Complaint included alleged violations of: the Racketeering Influence and Corrupt Organization Act, 18 U.S.C. §1964 (hereinafter "RICO"); the Civil Rights Act, 42 U.S.C. §1983; Federal Anti-Trust Laws under 16 U.S.C. §1 *et seq.*; and the State Law Torts of Libel, Slander and Intentional Infliction of Emotional Distress. (*See* Appendix of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania [hereinafter App. of Appeal] at 41-43).

Petitioner, Joseph Alberici, was indicted in 1982 on six counts of mail fraud, based upon evidence that he brought about the arson of the Jerry Lewis Theater in Aston, Pennsylvania in order to collect insurance proceeds. (App. of Appeal at 48-49). Prior to the fire at the Jerry Lewis Theater, Petitioner, Joseph Alberici, had entered into an agreement to purchase this property, and had obtained several fire insurance policies on it. (App. of Appeal at 16-17). He was found guilty of all six counts of mail fraud and was sentenced to a twenty month prison term on November 9, 1983. (App. of Appeal at 17). Petitioner was eventually granted a new trial on five of the six counts of mail fraud, but his conviction on count five of the indictment was sustained. (App. of Appeal at 30). On January 8, 1985, Petitioner, Joseph Alberici, filed a Motion for a New Trial alleging newly discovered evidence. Although he was granted ten hearings on this Motion, it was eventually denied on August 9, 1985. (App. of Appeal at 49). On June 27, 1987, the United States Court of Appeals for the Third Circuit upheld Alberici's conviction. *Id.* Nowhere in their Complaint do Petitioners show that any criminal proceedings were terminated in favor of Petitioner, Joseph Alberici, in a manner absolving him of guilt.

The Complaint in this matter also includes allegations surrounding a civil suit filed by Petitioners, Joseph and Theresa Alberici, against various insurance companies, who are also Respondents herein. (App. of Appeal at 17). Petitioners sought to recover insurance money for the damage to the Jerry Lewis Theater caused by the fire for which Joseph Alberici was eventually found responsible. Petitioners have not made any allegations that Respondents, Darby Borough and Thomas J. Powers, were involved with those civil proceedings, other than a vague allegation that these Respondents tried to harass them into stopping the suit. Petitioners have now added some new allegations against these Respondents in their Petition for Writ of Certiorari to this Honorable Court.

These factual allegations in the Petition should not be considered, as they were not part of the record below.

Respondents, Darby Borough and Thomas J. Powers, filed a Motion to Dismiss Petitioners' Complaint below pursuant to Federal Rule of Civil Procedure 12(b)(6) on or about October 18, 1991. This Motion was granted by the Order of the Honorable Franklin S. Van Antwerpen, entered March 13, 1992 and supplemented by Order entered March 20, 1992.

SUMMARY OF THE ARGUMENT

Petitioners have failed to set forth in their Petition sufficient reasons why this Honorable Court should review the Order of the Court of Appeals in this matter. The claims against Respondents, Darby Borough and Thomas J. Powers, were dismissed following their Motion to Dismiss in this matter because the Court found that all of their claims were barred by the applicable Statutes of Limitations. In addition, the Court found that Petitioners could not possibly state any viable cause of action against Respondents. The Court below therefore declined to grant Petitioners leave to amend their Complaint.

The claims of Petitioners below were properly dismissed as barred by the applicable Statutes of Limitations. Petitioners' Complaint included claims under the Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. §1964. Petitioners failed to allege any elements of a RICO cause of action occurring within the four year Statute of Limitations. In addition, Petitioners' allegations did not even amount to sufficient predicate offenses necessary for a RICO claim. Finally, a RICO cause of action cannot be maintained against Respondent, Darby Borough, as it is a municipality.

The Complaint in question also contained claims under the Civil Rights Act, 42 U.S.C. §1983. Such claims are governed by the state Statute of Limitations for personal injury actions, which in Pennsylvania is two

years. Petitioners failed to allege any conduct by Respondents occurring within two years of the filing of their Complaint which could support an action for civil rights violations.

The remainder of the instant Petition deals with Petitioner, Joseph Alberici's criminal case, or with other allegations that have nothing to do with Respondents herein. For this reason, Respondents will not address them in their Brief.

REASONS FOR DENYING THE PETITION

Pursuant to the Rules of this Honorable Court, a review on Writ of Certiorari will not be granted as a matter of right, but rather only by exercise of judicial discretion when there are "special and important reasons" supporting such review. Sup. Ct. R. 10.1. The Rules of the Supreme Court set forth examples of cases where review on a Writ of Certiorari will be considered. Sup. Ct. R. 10.1(a)-(c). These examples are as follows:

(a) When the United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with the state Court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this court's power of supervision.

(b) When a state Court of last resort has decided a federal question in a way that conflicts with a decision of another state Court of last resort or of a United States Court of Appeals.

(c) When a state Court or United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

> question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1.

In the instant case, Petitioners have set forth many allegations in their Petition, some of which relate to the case below, and some of which are new. To the extent that the claims in the Petition relate to the denial of Petitioners' request for a Writ of Coram Novis, Respondents will not comment, since they are not parties to that case. To the extent that the Petition in question refers to the Order affirming the dismissal of Petitioners' Civil Action against Respondents, Petitioners have failed to set forth any sufficiently special or important reasons why this Court should then grant review on Writ of Certiorari. Nowhere have Petitioners alleged that the ruling of the Court of Appeals was in conflict with a decision of any other United States Court of Appeals on the same matter, or with a state Court of last resort. Petitioners also do not indicate anywhere that the Court of Appeals departed from the accepted course of judicial proceedings in issuing its Order affirming the dismissal of their Complaint. Finally, Petitioners point to no important question of federal law which needs to be resolved by this Honorable Court.

It is obvious from the instant Petition that Petitioners are dissatisfied with the ruling of the United States Court of Appeals for the Third Circuit in their civil action. They have attempted to add additional facts which were not part of the record below in an attempt to further prove the merits of their claims. The fact remains, however, that their Complaint was dismissed by the District Court for failure to state any cause of action upon which relief could be granted against any of the Defendants below. (App. of Appeal at 63). The addition of other facts at this stage is improper. Also, even these additional facts do not offer this Honorable Court a sufficient reason why it should review the decision of the Court of Appeals.

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' ENTIRE COMPLAINT WITHOUT GRANTING LEAVE TO AMEND.

The United States District Court for the Eastern District of Pennsylvania dismissed Petitioners' entire Complaint with prejudice, as it found that each of their claims was barred by the applicable Statute of Limitations. (App. of Appeal, at 56, 59, 61, 62). In addition to the fact that claims were time-barred, the District Court noted that Petitioners did not state a single claim for relief, and declined to give them leave to amend their Complaint because it did not find: ". . . any reason to believe that a well-founded action could be stated. . ." (App. of Appeal at 63). In addition, the Court found that there was "an element of harassment" present in the filing of this Complaint by Petitioners. *Id.*

Petitioners have argued that they should have been allowed to amend their Complaint following the District Court's dismissal of the action for failure to state a claim. (Petition, pp. 38-39). As noted above, the District Court did not actually base its dismissal on Petitioners' failure to state a claim, but rather on the various Statutes of Limitations. The Court did, however, clearly indicate that it would not grant Petitioners leave to amend, because it found no way in which they could possibly state a claim for relief. (App. of Appeal at 63).

In support of their claim that they should have been granted leave to amend, Petitioners have cited the case of *Sidbotham v. Robison*, 216 F.2d 816 (9th Cir. 1954). In this case, the Court of Appeals for the Ninth Circuit noted that a Court should allow amendment to a pleading if: ". . . it is shown that other facts exist, which if alleged, would cure the defect." *Id.* at 826 [citations omitted]. The instant case is distinguishable from *Sidbotham* because here it is clear that the District Court felt that no other facts could be shown or pled which would cure the defects in Petitioners' Complaint. This is

especially evident because the trial Court went so far as to use the phrase "element of harassment" in referring to Petitioners' Complaint. (App. of Appeal at 63). The Court also clearly stated why it believed that Petitioners could not possibly state a well-founded cause of action. (App. of Appeal at 56, 61-62). While these explanations may be brief, they adequately serve to inform Petitioners and this Honorable Court of the reasons for the Court's dismissal of this action with prejudice. With respect to Petitioners' RICO claims, the Court notes that:

> . . . the Complaint fails to allege a RICO enterprise or enterprises, fails to allege any predicate act sufficient to constitute a pattern of racketeering activity, fails to overcome the judicial and prosecutorial immunities of many of the defendants and the *res judicata* affect of the judgment against Joseph Alberici in both the District Court and the Pennsylvania Court of Common Pleas.

App. of Appeal at 56.

With respect to Petitioners' claims under the Civil Rights Act, 42 U.S.C. §1983, the District Court noted that:

> The Complaint does not sufficiently allege that the non-state actors acted under color of state law. It does not overcome the traditional privilege granted to pleadings in judicial proceedings, it relies on facts which have already been decided against Plaintiffs in other judicial decisions which must be given preclusive effect, nor does it overcome judicial and prosecutorial immunities of many of the defendants.

App. of Appeal at 61.

Finally, with respect to Petitioners' state law claims for Libel, Slander and Intentional Infliction of Emotional Distress, the District Court noted that any allegations in the Complaint occurring after July 31, 1989 consist of statements made in pleadings and judicial opinions

which are recorded in absolute privilege under Pennsylvania law. (App. of Appeal at 62-63).

In their Motion to Dismiss the Complaint in this matter, Respondents, Darby Borough and Thomas J. Powers, demonstrated how Petitioners failed to state a claim under the RICO statute, 18 U.S.C. §1964, because they did not allege any acts by either Darby Borough or Thomas J. Powers which established a "pattern of racketeering activity." In fact, Petitioners did not attribute any *specific act* to either of these Respondents. In addition, Petitioners failed to establish the existence of an "enterprise" being conducted or supported through racketeering activity. *See* 18 U.S.C. §1962. Also, with respect to Respondent, Darby Borough, a RICO action cannot be maintained, as this Respondent is a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991). Petitioners failed to plead a sufficient cause of action against Respondents under 42 U.S.C. §1983 because they did not plead sufficient violations of their constitutional rights to support such an action, and also because they failed to meet the pleading requirement to establish liability against a municipality. Pleading requirements to establish liability for a violation of civil rights against a municipality were explained by the United States Court of Appeals for the Third Circuit in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990). Finally, Petitioners failed to plead violations of state tort law against Respondents which overcame the immunity traditionally granted to municipal entities and their employees under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541 *et seq*.

For the above-stated reasons, Respondents, Darby Borough and Thomas J. Powers, submit that the United States Court of Appeals properly affirmed the Order of the District Court dismissing Petitioners' Complaint with prejudice.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S CONCLUSION THAT PETITIONERS' RICO CLAIMS WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

As was noted by the Honorable Franklin S. Van Antwerpen of the United States District Court for the Eastern District of Pennsylvania, this Honorable Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759 (1957), held that the four year Statute of Limitations applicable to suits under the Clayton Act should also be applied to RICO actions. (App. of Appeal at 53). Although this Honorable Court did not decide when the limitations period would begin, the Third Circuit established that the period would run from the time that "the Plaintiff knew or should have known that the elements of the civil RICO cause of action existed." *Keystone Insurance Company v. Houghton,* 863 F.2d 1125, 1126 (3rd Cir. 1988). The *Houghton* Court also added that if a further injury or further predicate act were to occur, the cause of action would accrue from the time when the Plaintiff knew or should have known of the "last injury or predicate act which is part of the same pattern of racketeering activity." *Id.* at 1130.

The District Court observes that Petitioners' Complaint really alleged two separate "plots" against them, one dealing with the criminal prosecution of Joseph Alberici and one dealing with the civil suit by Joseph and Theresa Alberici against the insurance companies. (App. of Appeal at 54-55). The only allegations in the Complaint against Respondents, Darby Borough and Thomas J. Powers, appear in one paragraph wherein Petitioners allege that these Respondents conspired with others to harass Petitioner, Joseph Alberici, defraud him, and force him to stop his civil action. (App. of Appeal at 41). Petitioners never specified what was allegedly done by these Respondents, or when they were to have acted. *Id.* Since the Petitioners' civil suit was filed in 1978, these

actions could have taken place as many as thirteen years before the filing of the instant lawsuit. Also, the District Court clearly did not even find these allegations sufficient to constitute predicate offense as necessary for a RICO claim. (App. of Appeal at 55).

In addition, even if Petitioners' claims under the RICO statute were not time-barred and did not constitute predicate offenses under RICO, they would not be able to maintain a cause of action for RICO violations against Respondent, Darby Borough, as it is a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991). In the *Genty* case, the United States Court of Appeals for the Third Circuit became the first appellate court to hold that an action brought under 18 U.S.C. §1964(c) cannot be maintained against a municipality. *Id.* In so holding, the *Genty* Court noted that since the statute includes a mandatory recovery of treble damages, the primary purpose behind it was punitive. *Id.* at 914. The Court recognized that municipalities have traditionally been exempt from punitive damages, absent expressed statutory provisions to the contrary. 937 F.2d at 910. The rationale behind this exemption is that a municipality is incapable of committing a criminal act itself. *Id.* at 911. Another consideration is the fact that the only ones to really be "punished" would be the innocent taxpayers. *Id.*

For the above-stated reasons, Respondents submit that the Court of Appeals correctly affirmed the District Court's dismissal of Petitioners' RICO claims against Respondents, Darby Borough and Thomas J. Powers, as being barred by the Statute of Limitations. Even if said claims were not barred, they could not be maintained against Respondent, Darby Borough, as it is a municipality, and is therefore exempt from punitive awards. Also, Petitioners failed to state a viable claim for RICO violations against either of these Respondents, so their Complaint was properly dismissed with prejudice.

III. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' CIVIL RIGHTS CLAIMS AS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

This Honorable Court has held that §1983 actions are governed by the state statutes of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 278-280, 105 S.Ct. 1398, 1349 (1985). The Pennsylvania statute of limitations for personal injury actions is two years. 42 Pa. C.S.A. §5524(2). In its opinion, the District Court noted that unlike the accrual rule in a RICO action, for a civil rights action, the date when a cause of action accrues is "the date on which Plaintiffs knew or had reason to know of the injury that constitutes the basis of this action." (App. of Appeal at 57, *citing Deary v. Three Unnamed Police Officers*, 746 F.2d 185, 197 (3rd Cir. 1984)). The Court went on to state that it could tell from the face of the Complaint that Petitioners should have known of any injuries relating to the criminal persecution of Joseph Alberici by the date of his criminal conviction in 1983. (App. of Appeal at 57, *citing Syre v. Commonwealth of Pennsylvania,* 662 F. Supp. 550, 553-554 (E.D. Pa. 1987), *affirmed* 845 F.2d 1015 (3rd Cir.), *cert. denied* 488 U.S. 853, 109 S.Ct. 139 (1988)).

In their Brief to the Court of Appeals, and in the instant Petition, Petitioners have argued that their filing was timely as to civil rights violations, because of alleged fraudulent citations and warrants which they claim were issued between June 18, 1990 and December 5, 1990 by Respondents. (Appellants' Brief, p. 16 and Petition, p. 41). The actual paragraph in Petitioners' Complaint refers to citations and warrants, but does not mention the dates of the citations and warrants, nor does it adequately explain how these alleged citations and warrants were related to the prior conviction of Joseph Alberici, or to the civil action filed against the insurance

companies. (App. of Appeal at 41). Even if the Complaint had mentioned the dates of these alleged actions, this paragraph is insufficient to state a cause of action for a violation of 42 U.S.C. §1983, because it fails to meet the heightened pleading requirement established by the United States Court of Appeals for the Third Circuit for civil rights actions. *See Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978); *Agresta v. City of Philadelphia*, 694 F.Supp. 117, 119-120 (E.D. Pa. 1988).

The District Court also noted that the Statute of Limitations for Petitioners' civil rights claim was not tolled under the Doctrine of Fraudulent Concealment because Petitioners never claimed in their Complaint that any conduct was concealed from them, or that they discovered it only recently. (App. of Appeal at 59). The Court further stated that Petitioners allege no due diligence in investigating the conduct and trying to discover the claims from the time the alleged actions occurred until the time they filed their Complaint. *Id.* In its Memorandum Opinion, the District Court made clear that there are certain elements which Petitioners must allege in their Complaint in order to benefit from the Doctrine of Fraudulent Concealment. (App. of Appeal at 58, *citing Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F.Supp. 271, 273 (E.D. Pa. 1986)). Petitioners clearly failed to meet the standards in their Complaint, and did not even attempt to set forth any facts in their Brief or in the instant Petition which would give this Honorable Court reason to reverse the decision of the Court of Appeals on the basis of fraudulent concealment. Therefore, the Order of the United States Court of Appeals affirming the trial Court's dismissal of Petitioners' claims on the basis of the Statute of Limitations must be affirmed.

IV. RESPONDENTS NEED NOT ADDRESS PETITIONERS' CLAIMS WHICH INCLUDE FACTS NOT OF RECORD BELOW, OR WHICH RELATE TO ACTIONS WHICH THEY ARE NOT A PARTY OR ACTIONS OCCURRING AFTER THE FILING OF THE INSTANT LAWSUIT.

As has been explained above, Petitioners' Complaint against Respondents, Darby Borough and Thomas J. Powers, was dismissed because the facts as pled did not state a cause of action against these Respondents which fell within the applicable Statutes of Limitations, or which was sufficiently plead so as to indicate that Petitioners were entitled to any relief. Petitioners cannot now allege new facts which were not of record below. Also, Petitioners have added allegations as to incidents which occurred after the filing of their Appeal with the United States Court of Appeals for the Third Circuit. These claims mention individuals and/or entities which are not parties to the instant action. For this reason, these allegations should not be considered by this Honorable Court, and Respondents need not comment on them any further.

CONCLUSION

For the above-stated reasons, Respondents, Darby Borough and Thomas J. Powers, respectfully request that this Honorable Court deny Petitioners' Petition for Writ of Certiorari in the matter of *Joseph and Theresa Alberici v. United States Government, et al.* (U.S. Court of Appeals No. 92-1258). Respondents also respectfully request that this Honorable Court award costs and sanctions, including but not limited to attorney's fees, against Petitioners and in favor of Respondents.

Respectfully submitted,
HOLSTEN & WHITE

BY: _____
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Date: February 8, 1993